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Supreme Court, U.S.

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NO.

In The

**Supreme Court Of The United States**  
**OCTOBER TERM, 1988**

DONALD A. LOWRY,

*Petitioner,*

v.

BANKERS LIFE AND CASUALTY RETIREMENT PLAN, *et al*,

*Respondents.*

**PETITION FOR WRIT OF CERTIORARI TO THE**  
**UNITED STATES COURT OF APPEALS**  
**FOR THE FIFTH CIRCUIT**

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## QUESTIONS PRESENTED

1. Whether an ERISA fiduciary's duties under 29 U.S.C.A. §1104(a)(1)(D) are subject to modification by private settlor trust terms to remove errors of law in claim denials by trust fiduciaries from *de novo* judicial review?
2. Whether all future ERISA claim denials by biased administrators are to be decided based upon whether the pleadings of the claimant on file before *Bruch* was handed down raised administrator bias as a factor of judicial review and asked for judicial relaxation of the now repealed arbitrary and capricious test because of such bias?
3. Whether ERISA trust fiduciary agents are acting within the bounds of proper "discretion" when they do not follow correct common law reading and construction principles in processing benefits claims?
4. Whether an ERISA trust that expressly makes the administrator's discretion revocable and subservient to the employer's post-creation control creates a sufficiently independent fiduciary whose conduct must be reviewed by an abuse of discretion standard?

## LIST OF PARTIES

The parties to the proceedings below were the Petitioner, Donald A. Lowry and the Respondents, Bankers Life and Casualty Retirement Plan, Savings Investment Plan, Bankers Life and Casualty Company, Union Bankers Insurance Company, Robert P. Ewing, Chester M. Lozowski, Paul Janus, Barth Murphy, Paul Higdon, Jack Simmer, Tom Dunphy, Jim Dentle, Jack Gardiner and Robert Shaw.

## TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED .....	i
LIST OF PARTIES .....	ii
OPINIONS BELOW .....	1
JURISDICTION .....	2
STATUTES INVOLVED .....	2
STATEMENT OF THE CASE .....	3
Statement of Facts .....	3
Prior Proceedings .....	5
REASONS FOR GRANTING THE WRIT .....	8
I. THE COURT OF APPEALS COMMITTED ERROR IN HOLDING ERISA TRUSTS MAY REQUIRE COURT REVIEW OF ADMINISTRATOR'S CLAIM DENIALS BY AN ABUSE OF DISCRETION STANDARD EVEN AS TO ERRORS OF LAW BY A BIASED ADMINISTRATOR .....	8
II. THE COURT OF APPEALS ERRED IN HOLDING A BIASED TRUSTEE MAY CLAIM PETITIONER'S <i>BRUCH</i> -CREATED RIGHT TO COMPLAIN OF TRUSTEE CONFLICTS WAS WAIVED BY FAILURE TO RAISE POINTS OF ERROR TO ALLEGE, <i>PRE-BRUCH</i> , THAT TRUSTEE CONFLICT WAS PART OF THE JUDICIAL REVIEW TEST UNDER ERISA .....	17
III. THE COURT OF APPEALS ERRED IN HOLDING THAT THE TERMS OF THE ERISA TRUSTS IN DISPUTE ADE- QUATELY CREATE AN INDEPENDENT ADMINISTRATOR AND GRANT THE REQUIRED IRREVOCABLE PLENARY DISCRETION TO CONSTRUE PLAN TERMS CONTEMPLATED BY <i>BRUCH</i> .....	18
CONCLUSION .....	23
APPENDIX .....	1a

## TABLE OF AUTHORITIES

Cases:	Page
<i>Boyd v. Trustees of United Mine Workers Health and Retirement Funds</i> , 873 F.2d 57 (4th Cir. 1989) . . . . .	10
<i>Burditt v. Western Growers, Pension Plan</i> , 636 F. Supp. 1491 (C.D. Cal. 1986) <i>aff'd</i> , 818 F.2d 698 (9th Cir. 1987) . . . . .	10, 15
<i>Burns v. Louisiana Land &amp; Exploration Co.</i> , 870 F.2d 1016 (5th Cir. 1989) . . . . .	13
<i>Carr v. Trustees of Hotel and Restaurant Employees and Bartenders International Union Pension Fund</i> , 585 F. Supp. 949 (E.D. Pa. 1984) . . . . .	15
<i>Central States Pension Fund v. Central Transport, Inc.</i> , 472 U.S. 559, 105 S. Ct. 2833, 86 L.Ed.2d 447 (1985) . . . . .	20
<i>Charter Limousine, Inc. v. Dade County Board of Commissions</i> , 678 F.2d 586 (5th Cir. 1982) . . . . .	12
<i>City of Austin, Texas v. Decker Coal Co.</i> , 701 F.2d 420 (5th Cir. 1983) . . . . .	13
<i>Coca Cola Company v. Atchison, Topeka and Santa Fe Railway Company</i> , 608 F.2d 213 (5th Cir. 1979) . . . . .	12
<i>Danti v. Lewis</i> , 312 F.2d 345 (D.C. Cir. 1962) . . . . .	9
<i>De Jesus v. General Motors Acceptance Corp.</i> , 645 F. Supp. 146 (D. Puerto Rico 1986) . . . . .	15
<i>Donovan v. Carlough</i> , 576 F. Supp. 245 (D.D.C. 1983) . . . . .	15
<i>Donovan v. Cunningham</i> , 541 F. Supp. 276 (S.D. Tex. 1982), <i>aff'd in part</i> , 716 F.2d 1455 (5th Cir. 1983), <i>cert. denied</i> , 104 S. Ct. 3533 (1984) . . . . .	15
<i>FCC v. Pottsville Broadcasting Company</i> , 309 U.S. 134, 60 S. Ct. 437, 84 L.Ed. 656 (1940) . . . . .	11
<i>Firestone Tire &amp; Rubber Co. v. Bruch</i> , ____ U.S. ____, 109 S. Ct. 948, 103 L.Ed.2d 80 (1989) . . . . .	15
<i>FTC v. Indiana Federation of Dentists</i> , 476 U.S. 447, 106 S. Ct. 2009, 90 L.Ed. 2d 445 (1986) . . . . .	11

## TABLE OF AUTHORITIES—Continued

Cases:	Page
<i>Hay v. South Cent. Bell Tel. Co.</i> , 475 So. 2d 1052 (La. 1985) .....	11
<i>I.C.C. v. Clyde S.S. Co.</i> , 181 U.S. 29, 21 S. Ct. 512, 45 L.Ed. 729 (1901) .....	11
<i>Jacobson v. John Hancock Mut. Life Ins. Co.</i> , 662 F. Supp. 1103 (D.C. Conn. 1987) .....	15
<i>Lowry v. Bankers Life and Cas. Co. Retirement Plan</i> , 871 F.2d 522 (5th Cir. 1989) .....	17
<i>Lowry v. Bankers Life and Cas. Retirement Plan</i> , 865 F.2d 692 (5th Cir. 1989) .....	6
<i>Marshall v. Craft</i> , 463 F. Supp. 493 (D.C. Ga. 1978) ..	15
<i>Massachusetts Mut. Life Ins. Co. v. Russell</i> , 473 U.S. 134, 105 S. Ct. 3085, 87 L.Ed 2d 96 (1985) .....	16
<i>Mullins v. Andrus</i> , 664 F.2d 297 (D.C. Cir. 1980) .....	11
<i>NLRB v. Enterprise Ass'n of Steam, Pipefitters Local 638</i> , 429 U.S. 507, 97 S. Ct. 891 51 L.Ed.2d 1 (1977) .....	11
<i>Oien v. Co-op Retirement Committee</i> , 709 F. Supp. 917 (D.S.D. 1989) .....	9
<i>Pennzoil Company v. F.E.R.C.</i> , 789 F.2d 1128 (5th Cir. 1986) .....	11
<i>Petrou Fisheries, Inc. v. I.C.C.</i> , 727 F.2d 542 (5th Cir. 1984) .....	11
<i>Policy v. Powell Pressed Steel Co.</i> , 770 F.2d 609 (6th Cir. 1985) .....	10, 15
<i>R &amp; P Enterprises v. LaGuarta Gavrel &amp; Kirk, Inc.</i> , 596 S.W.2d 517 (Tex. 1980) .....	7
<i>Richardson v. Central States, S.E. &amp; S.W. Areas Pension Fund</i> , 645 F.2d 660 (8th Cir. 1981) .....	9
<i>Schultz v. Metropolitan Life Ins. Co.</i> , 872 F.2d 676 (5th Cir. 1989) .....	16
<i>SEC v. Chenery Corp.</i> , 318 U.S. 80, 63 S. Ct. 454, 87 L.Ed. 626 (1943) .....	11

## TABLE OF AUTHORITIES—Continued

<i>Cases:</i>	Page
<i>Short v. Central States, S.E. &amp; S.W. Areas, Pen. Fund</i> , 729 F.2d 567 (8th Cir. 1984) .....	9
<i>South Hampton Co. v. Stinnes Corp.</i> , 733 F.2d 1108 (5th Cir. 1984) .....	7
<i>Thonen v. McNeil-Akron, Inc.</i> , 661 F. Supp. 1252 (N.D. Ohio 1986) .....	10, 15
<i>Wolf v. National Shopmen Pension Fund</i> , 728 F.2d 182 (3rd Cir. 1984) .....	15
 <i>Statutes and Regulations:</i>	
Employee Retirement Income Security Act of 1974, 29 U.S.C.A. §§1001 <i>et seq</i> (West 1985) .....	2
5 U.S.C.A. §706 (West 1977) .....	11
29 U.S.C.A. §1104(a)(1)(D) (West 1985) .....	2, 16
29 U.S.C.A. §1110(a) (West 1985) .....	3, 15, 16
29 U.S.C.A. §1132(a) (West 1985) .....	3, 21
 <i>Miscellaneous:</i>	
G. Bogert, <i>Trusts and Trustees</i> (6th ed. 1987) .....	14
 <i>Legislative Materials:</i>	
H. R. Rep. No. 533, 93d Cong., 1st Sess. 11 (1973) ...	15
S. Rep. No. 127, 93d Cong. 1st Sess. 29 (1973) .....	15

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**PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

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TO THE SUPREME COURT OF THE UNITED STATES:

Petitioner, Donald A. Lowry, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit in this case.

**OPINIONS BELOW**

The original opinion of the Court of Appeals for the Fifth Circuit, dated February 17, 1989, is reported at 865 F.2d 692, and is reprinted in the appendix hereto, p. la, *infra*.

The opinion of the Court of Appeals for the Fifth Circuit denying Rehearing, decided April 28, 1989, is reported at 871 F.2d 522, and is reprinted in the appendix hereto, p. 1b, *infra*.

The Memorandum decision of the United States District Court for the Northern District of Texas, Samuel Ray Cummings, J., is reported at 678 F. Supp. 635, and is reprinted in the appendix hereto, p. 1c, *infra*.

### JURISDICTION

The judgment of the District Court for the Northern District of Texas, Dallas Division, was entered on the 9th day of February 1988. The jurisdiction of the District Court was invoked under 29 U.S.C.A. §1132(a)(1)(B). Jurisdiction of this Court is invoked under 28 U.S.C.A. §1254(1).

### STATUTES INVOLVED

Employee Retirement Income Security Act of 1974, 29 U.S.C.A. §§1101, *et seq.* (West 1985)

29 U.S.C.A. §1104(a)(1)(D) (West 1985) provides in relevant part:

- (1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and —

\* \* \*

- (D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter or subchapter III of this chapter.

29 U.S.C.A. §1110(a) (West 1985) provides in relevant part:

- (a) Except as provided in sections 1105(b)(1) and 1105(d) of this title, any provision in an agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty under this part shall be void as against public policy.

## STATEMENT OF THE CASE

### Statement of the Facts

Petitioner, Donald A. Lowry, filed this civil action in the United States District Court for the Northern District of Texas, Dallas Division, on February 10, 1987. It is a claim for benefits under the 1974 Employee Retirement Income Security Act, 29 U.S.C.A. §1001 *et seq.* (West 1985) ("ERISA") Petitioner sought to enforce his rights, and to recover benefits due to him under the terms of two (2) plans as authorized by 29 U.S.C.A. §1132(a) (West 1985).

On February 1 and 2, 1988, the case was tried without a jury before the Honorable Samuel R. Cummings, United States District Judge for the Northern District of Texas. The District Court entered judgment on February 9, 1988, and a Memorandum Opinion on the same date.

Bankers Life and Casualty Company, and its affiliated companies, maintained two (2) basic benefit plans — the Retirement Plan and the Savings Plan. The company itself was administrator of both the Retirement and Savings Plan and appointed a committee "to serve at the pleasure of the Board of Directors of the company" as administrator of the Savings Plan.

Petitioner was employed continuously and without any break in his employee status with Bankers Life and Casualty Company ("the company" herein) or one of its affiliates

for over thirty-five (35) years, from October 1, 1950 to March 1, 1986. At the request of an affiliate (Union Bankers), Petitioner entered into a general agent's contract on March 1, 1979 and served as a general agent until December 15, 1979 and received from the affiliate company general agent commissions in a stipulated amount of \$585,025.52.

Petitioner testified, without contradiction, that John Coffman, then President of Union Bankers, an affiliate company, asked him to establish the general agency in January 1979. At that time, Petitioner was told by Coffman, after review of the terms of the two (2) Plans, that his concerns over the general agency commissions not "being covered" by the Plans were unfounded because the company would agree to carry him, at the same time he was to serve as a general agent, as an employee on the home office payroll of the company or an affiliate. This dual role, although never before afforded any other general agent, would, Coffman explained, cause all the general agent commissions paid Petitioner to fall within the terms of covered "compensation" under the two (2) Plans.

Bankers Retirement Plan defined "Compensation," at all material times, as:

The term "Compensation" shall mean the total currently taxable remuneration paid by the Employers and Affiliates to a Compensated Employee for services rendered. . . . Notwithstanding the foregoing, Compensation shall not include any payments made pursuant to an insurance agent or agency contract between the Company or the Affiliate and the payee; *provided, that subsequent to February 28, 1977, Compensation shall include remuneration paid pursuant to insurance agent or agency contracts provided that the payee, at the time of payment, is employed on the home office payroll, or as a Field Manager, or as a field office clerical employee of the Company or an Affiliate.*

(Emphasis Added)

The stipulations entered into by the parties in the Pretrial Order included:

That from March 1, 1979 to December 15, 1979, Plaintiff held a General Agent's contract with Union and was at all relevant times carried on the home office payroll of Union or Bankers Life.

The Plaintiff has been paid retirement benefits from the Plan(s) for all compensation paid Plaintiff as regular salary and commissions other than the overwrite commissions paid Plaintiff pursuant to the March 1, 1979 General Agent's contract. (Pretrial Order, Appendix, p. 4h).

The Pretrial Order also provided in the "Contested Issues of Law" the following legal question:

What is the correct interpretation of the Plan(s) in question with regard to whether commissions paid Plaintiff by Defendant Union qualify as "compensation" for retirement purposes? (Pretrial Order, Appendix, p. 6h).

Petitioner contended at trial that the clear terms of both Plans were such that the overwrite commission income received by Petitioner pursuant to the General Agent's contract qualified as "compensation" for which the Petitioner should have been paid retirement benefits. The Respondents claimed that though the written text of the two (2) Plans *appeared* to grant coverage of the disputed income, the court was not free to overrule the administrator's reading and "construction" of the Plans because this misreading was only one of many factors the Court was required to consider under the arbitrary and capricious review standard.

### **Prior Proceedings**

The trial court, applying the arbitrary and capricious standard, held in favor of the plan administrator and denied benefits to Petitioner. In doing so, the trial court stated:

Lowry claims that he is entitled to these additional retirement benefits based on the "plain language" of the documents governing the Plan. Further, Lowry claims

that he was a "compensated employee" on the home office payroll for purposes of including such commissions in the retirement Plan calculation because he was subsidized on the home office payroll of Union and/or Bankers at the same time he was paid general agent's commissions.

Lowry was an employee of Bankers or its affiliates, including Union and Certified Life Insurance Company of California, from 1950 until his retirement in 1986. During a nine and one-half month period in 1979, Lowry was a general agent for Union pursuant to a general agent's contract. As an employee of Bankers and its affiliates, Lowry was eligible to participate in the Plans from and after the institution of such Plans in 1960, as amended or modified thereafter, until Lowry's retirement in 1986. In accordance with the Plan, Bankers made contributions based on Lowry's salary and personal production commissions. No contributions were ever made to Lowry's retirement account for the general agent commissions paid to Lowry pursuant to the general agent's contract with Union.

The dispute between the parties is the determination of the meaning of the language found in the Plans in question.

The Court of Appeals for the Fifth Circuit, also applying an arbitrary and capricious review standard, affirmed the denial of benefits, stating,

The actions of a plan committee must be upheld unless a plaintiff proves that the committee has acted in an arbitrary and capricious matter. . . this strict standard limits excessive judicial intervention in the administration and operation of trusts. Discretion is a touchstone of trusteeship, and we invade the province of the trustee only when he violates the proper exercise of his discretion.

*Lowry v. Bankers Life and Cas. Retirement Plan*, 865 F.2d 692, 694 (5th Cir. 1989).

Both the trial court and the Court of Appeals noted that "the fact that a trustee's interpretation is not the correct

one as determined by a district court does not establish in itself arbitrary and capricious action, but is a factor in that determination." District Court Memorandum of Opinion, p. 11; *Lowry, supra*, 865 F.2d at 694. Neither court mentioned the conflict of interest of the administrator of the Plans as a factor to be considered.<sup>1</sup>

In its original ruling, on February 17, 1989, the Court of Appeals held the arbitrary and capricious review standard required it to judicially defer to the ERISA administrator's conduct in reading the terms of the ERISA trusts. The Court also held that Petitioner could not point to language in the Plans the Court felt was "crystal clear on its face" or which "inexorably compels a particular interpretation." Thus, the Court ruled the conduct of the ERISA administrator in resorting to extrinsic evidence to arrive at its "construction" of the Plans was but one of many fact elements to be employed in an arbitrary and capricious review of the matter by the courts. Under such test the Court of Appeals held the misreading error/conduct of Respondents "reasonable."<sup>2</sup>

Four (4) days later, on February 21, 1989, *Bruch* was handed down by this Court. Petitioner asked for a rehearing based upon *Bruch* which, on April 28, 1989, the Court of Appeals denied. In its opinion on rehearing, the Court of Appeals held that even under *Bruch* standards, the ERISA trusts in the case at bar contained such explicit terms as to

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<sup>1</sup>The employer is the administrator of both Plans.

<sup>2</sup>It is clear that legal ambiguity of integrated documents such as trusts has always been determined (1) only from the face of the documents, (2) as a *de novo* question of law, and (3) only when raised by the trial court pleadings of a party. *South Hampton Co. v. Stinnes Corp.*, 733 F.2d 1108, 1114-16 (5th Cir. 1984); *R & P Enterprises v. LaGuarta Gavrel & Kirk, Inc.*, 596 S.W.2d 517, 518 (Tex. 1980). These cases also make it clear that *only* where the text of an integrated trust contains two (2) reasonable but differing possible meanings may it be held to be legally ambiguous. In the case at bar, such threshold textual ambiguity never existed and does not now exist. See section I, *infra*.

grant trust administrators the unfettered discretion to legally construe Plan terms and to require such "construction," even if conducted in violation of common law rules of construction, be reviewed by the Court as are fact findings under an abuse of discretion standard. The court refused to consider the administrator's conflict, holding that Petitioner waived his rights to insist on its being part of the Court's consideration by failing to raise it *before Bruch* was decided.

## REASONS FOR GRANTING THE WRIT

### I.

**THE COURT OF APPEALS COMMITTED ERROR IN HOLDING ERISA TRUSTS MAY REQUIRE COURT REVIEW OF ADMINISTRATORS CLAIM DENIALS BY AN ABUSE OF DISCRETION STANDARD EVEN AS TO ERRORS OF LAW BY A BIASED ADMINISTRATOR.**

**"PARTICIPANTS CANNOT REALLY KNOW WHERE THEY STAND IF BIASED ADMINISTRATORS HAVE DISCRETIONARY AUTHORITY, TO WHICH COURTS MUST DEFER, TO CONSTRUE PLAN TERMS."<sup>3</sup>**

Petitioner's principal complaint with the conduct of the ERISA administrator in denying him ERISA protected benefits under the Plans in question is his claim that the fiduciary administrator undertook to "construe" or "interpret" ERISA plans which are, as to the coverage issues raised, legally clear and unambiguous on their face. This was an error of law and should have been reviewed *as such* by the District Court and the Court of Appeals.

The Pretrial Order and pleadings establish no claim by any party that the written text of the ERISA plan docu-

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<sup>3</sup>Amicus Brief for the United States, Supporting Respondents in *Bruch*, p. 15.

ments are ambiguous. See Pretrial Order, appendix p. 2h, *infra*. The Respondent administrators claimed though the face of the Plans appeared to grant coverage and the parties had stipulated facts sufficient to foreclose any question of Petitioner's qualification factually for such coverage, the latitude and deference granted ERISA administrators by the arbitrary and capricious review standard required the Courts to consider the trustee's misreading of trust documents as only one of the other "factors" contemplated by the arbitrary and capricious test as it was then stated by the Fifth Circuit Court of Appeals. Petitioner submits such argument amounted to a claim, upheld by the lower courts, that ERISA trustee's errors of law (failing to follow the common law rules of construction) must, by reason of the private settlor trust terms, be treated by the courts as errors of fact.

The now-rejected arbitrary and capricious review standard was promulgated not by statute but by the federal courts, thus its development was disjointed, obfuscated and often marked by direct conflict by and between the various Circuit Courts. Few courts were ever called upon to focus directly on the difference between fact errors by ERISA trustees and legal errors. The cases that raise the point do differentiate between fact determinations by an ERISA trustee — which, pre-*Bruch*, were reviewed under the arbitrary and capricious standard of review — and errors of law by the trustees — which uniformly are reviewed *de novo*.

In *Short v. Central States, S.E. & S.W. Areas Pen. Fund*, 729 F.2d 567 (8th Cir. 1984), the Eighth Circuit Court of Appeals reviewed an error of law by an ERISA trustee with a legal *de novo* review and not by an arbitrary and capricious fact review test, citing *Danti v. Lewis*, 312 F.2d 345 (D.C. Cir. 1962) and *Richardson v. Central States, S.E. & S.W. Areas Pension Fund*, 645 F.2d 660 (8th Cir. 1981). In *Oien v. Co-op Retirement Committee*, 709 F. Supp. 917 (D.S.D. 1989)

the court, citing *Short*, held that ERISA fiduciary errors of law are to be treated different from fact errors. In *Boyd v. Trustees of United Mine Workers Health and Retirement Funds*, 873 F.2d 57 (4th Cir. 1989) (decided April 21, 1989), the Court of Appeals for the Fourth Circuit, applying the abuse of discretion standard of *Bruch*, held that an ERISA trustee's failure to employ the correct legal standard (in *Boyd* a prior causation standard) to judge a disability claim — that is, an error of law in claims handling — was an abuse of discretion *per se* under *Bruch*. *Id.* at 60. The Court stated that such legal standard of the prior case law on causation “*in effect sets bounds on the range of discretion that the Pension Plan confers on the Trustees to deny claims under the circumstances presented here.*” *Id.* at 60 (Emphasis added). *Boyd* supports the rule that legal errors are not considered by courts as within the “discretion” of ERISA administrators, even under a *Bruch* standard of abuse of discretion, and conflicts directly with the ruling of the Court of Appeals.<sup>4</sup>

The Court of Appeals' error in the case at bar can perhaps best be seen by examination of proper judicial review of administrative government determinations. 5 U.S.C.A. §706, sets out the scope of review of agency determinations by courts. It states in part as follows:

The reviewing court shall —

\* \* \*

- (2) hold unlawful and set aside such agency action, findings and conclusions found to be —
  - (A) arbitrary, capricious, and an abuse of discretion, or otherwise not in accordance with law;

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<sup>4</sup>Other cases have treated ERISA administrators' legal errors in attempting to “construe” clear trust terms by use of extrinsic evidence, as freely reviewable and not subject to judicial deference. See *Policy v. Powell Pressed Steel Company*, 770 F.2d 609, 612-13 (6th Cir. 1985); *Thonen v. McNeil-Akron, Inc.*, 661 F. Supp. 1252 (N.D. Ohio 1986); *Burditt v. Western Growers Pension Plan*, 636 F. Supp. 1491 (C.D. Cal. 1986) *aff'd* 818 F.2d 698 (9th Cir. 1987).

\* \* \*

(C) *in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;*

(D) *without observance of procedure required by law; . . .*

5 U.S.C.A. §706(2)(A), (C) & (D) (West 1977) (Emphasis added).

In reviewing administrative determinations, this Court and others consistently hold that while errors of fact are properly reviewed by an arbitrary and capricious standard, when an administrative agency is alleged to have made errors of law, such legal rulings are freely reviewed by courts *de novo* without obligation to defer to the agency's legal conclusions. *I.C.C. v. Clyde S.S. Co.*, 181 U.S. 29, 32-33, 21 S. Ct. 512, 514, 45 L.Ed. 729 (1901), *NLRB v. Enterprise Ass'n of Steam, Pipefitters Local 638*, 429 U.S. 507, 522 n.9, 97 S. Ct. 891, 900 n.9, 51 L.Ed.2d 1 (1977); *SEC v. Chenery Corp.*, 318 U.S. 80, 95, 63 S. Ct. 454, 462, 87 L.Ed. 626 (1943); *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 106 S. Ct. 2009, 2016, 90 L.Ed. 2d 445 (1986); *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 144-45, 60 S. Ct. 437, 442, 84 L.Ed. 656, 663 (1940); *Mullins v. Andrus*, 664 F.2d 297 (D.C. Cir. 1980); *Hay v. South Cent. Bell Tel. Co.*, 475 So.2d 1052 (La. 1985). The Fifth Circuit Court of Appeals has cited and followed these principles on numerous occasions. See *Petrou Fisheries, Inc. v. I.C.C.*, 727 F.2d 542, 545 (5th Cir. 1984) and *Pennzoil Company v. F.E.R.C.*, 789 F.2d 1128 (5th Cir. 1986).

In *Pennzoil*, *supra*, the Fifth Circuit Court of Appeals dealt with an error of evidence law by an administrative agency almost identical to the error of law shown in the case at bar. Natural gas producers sought review of Federal Energy Regulatory Commission orders complaining of errors of law in how it went about construing a contract. The Court found the Commission erroneously refused to

consider the text of the language of the contracts as evidence of intent and had erroneously examined *only* extrinsic evidence to determine the intent of the parties to the ambiguous contract. This misapplication of the law of construction of ambiguous contracts was held an error of law by the administrative agency and therefore *not* to be treated like a fact error or determination. The Court held errors of law freely reviewable by courts, with no obligation to defer to the agency's legal error. This is consistent with previous Fifth Circuit Court of Appeals' decisions. *Coca Cola Company v. Atchison, Topeka and Santa Fe Railway Company*, 608 F.2d 213, 218 (5th Cir. 1979); *Charter Limousine, Inc. v. Dade County Board of Commissions*, 678 F.2d 586, 588 (5th Cir. 1982).

In the case at bar, however, the Court of Appeals ruled that the language of the trust documents grant such plenary discretion to the administrative committees that even their errors of law are to be reviewed under the same arbitrary and capricious review standard which the courts used in the past to review errors of fact by ERISA trustees.

The written text of the ERISA plans in question clearly state income paid general agents is "compensation" provided, *at the time* of payment, the "payee" general agent is employed on the home office payroll of the company or an affiliate. Without any party requesting, pleading, or obtaining a determination by the trial court that the language of the controlling plans is ambiguous, and in the face of trial court stipulations and admissions by administrators that the plan language was *not* ambiguous "*on its face*," the Court of Appeals tolerated the trustee and trial court resorting to extrinsic or secondary evidence to judicially "construe" the ERISA plans to arrive at an interpretation which impeaches the text of the ERISA trusts.<sup>5</sup> The Fifth Circuit has done so

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<sup>5</sup>In oral argument in the Court of Appeals Respondent's counsel, in response to a question from Judge Davis, admitted if only the text of the Plans controlled "We lose."

by treating the trustees' disrespect for the common law rules of construction such as the Parol Evidence Rule and the Rule of Four Corners (requiring unambiguous trust documents and contracts be construed on the written text without resort to extrinsic evidence) as the Court would treat factual mistakes. A clearer example of an error of law by an ERISA trustee would be harder to imagine.<sup>6</sup>

The District Court and the Court of Appeals did, however, understand the rule of law breached as shown by attempts to identify possible "ambiguity" in Plan terms, though none of the parties claim it existed. For example, the District Court concluded perhaps the term "home office payroll" was unclear. 673 F. Supp. at 641-42. The parties had no such conflicting meanings about that term and, in fact, stipulated the "issue" away in the Pretrial Order. See Pretrial Order, Appendix p. 4h, *infra*. Likewise, "remuneration" and "compensation" were alleged to be perhaps unclear, yet review of the General Agent's contract involved uses both the word "remuneration" and "compensation" to describe the monies to be earned by Petitioner.<sup>7</sup>

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<sup>6</sup>It is clear the Fifth Circuit Court of Appeals holds these rules of contract interpretation are matters of law, reviewable *de novo*, outside ERISA. In *Burns v. Louisiana Land & Exploration Co.*, 870 F.2d 1016 (5th Cir. 1989) (decided April 25, 1989) the Court stated:

We first determine the appropriate standard of review. This case presents a question of construction of a lease. Generally, contract interpretation is a matter of law reviewable *de novo* on appeal. *City of Austin, Texas v. Decker Coal Co.*, 701 F.2d 420, 425 (5th Cir. 1983). Ambiguous contracts may require consideration of evidence beyond the four corners of the contract in order to determine the parties' intent, thus involving questions of fact, but whether a contract is ambiguous is itself a question of law. *Id.* at p. 425-26. Neither party here argues that the lease is ambiguous, nor did the district court rely on extrinsic evidence in granting summary judgment to the defendants when presented with cross-motions. Therefore, although the parties sharply disagree as to the effect of the lease in this case, we treat it as unambiguous and proceed to construe it *de novo*.

*Id.* at 1018.

<sup>7</sup>See General Agents Contract, section 5 and 8.D, Appendix p. 1g and 3g, *infra*.

The basic protections afforded by the common law rules of construction are indeed imperative to the property rights of ERISA beneficiaries and to the integrity of written ERISA plans. It is also beyond the contemplation of the ERISA statute to hold, as the Court of Appeals has, that private settlors of ERISA protected trusts may promulgate trust terms that mandate deference by the courts to trustees' errors of *law* and the treatment of such as errors of fact. It would likewise seem illogical that private ERISA trustees should be granted the benefit of less stringent judicial review of their legal errors than administrative arms of government.

The Fifth Circuit's opinion denies Petitioner due process and equal protection of law when it holds errors of ERISA law are to be judged as errors of fact. An ERISA settlor simply cannot grant an administrator of an ERISA protected trust "discretionary" authority to decide matters of law. It is against public policy for such decisions to be removed from judicial review. Such attempted grant is void!<sup>8</sup> Such amounts to granting a trustee relief from an ERISA-imposed fiduciary standard of care. Any such grant purporting to relieve a fiduciary from "responsibility or liability for any responsibility, liability or duty under this part shall be void as against public policy." 29 U.S.C.A. §1110(a) (West 1985); *see also* Bogert, *Trusts and Trustees* (6th Ed. 1987) §175, p. 668.

The ERISA statute itself imposes strict fiduciary duties upon all plan administrators to discharge their duties "in accordance with the documents and instruments governing the plan." 29 U.S.C.A. §1104(a)(1)(D) (West 1985). A number of cases hold any trust provision purporting to relieve an ERISA fiduciary from any of the ERISA-imposed duties, including 29 U.S.C.A. §1104(a)(1)(D), is to be judicially

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<sup>8</sup>29 U.S.C.A. §1110(a) (West 1985).

declared "void as against public policy" in accordance with 29 U.S.C.A. §1110(a). *Donovan v. Cunningham*, 541 F. Supp. 276 (1982), *aff'd in part*, 716 F.2d 1455, *cert. denied*, 104 S. Ct. 3533; *Marshall v. Craft*, 463 F. Supp. 493 (D.C. Ga. 1978); *Jacobson v. John Hancock Mut. Life Ins. Co.*, 662 F. Supp. 1103 (D.C. Conn. 1987).<sup>9</sup>

The following cases hold clear ERISA plan terms may *not* legally be altered by resort to extrinsic evidence by administrators without such being treated as an abuse of discretion (an error of law) *per se* by the reviewing court. *Firestone Tire & Rubber Co. v. Bruch*, — U.S. —, 109 S. Ct. 948, 103 L.Ed.2d 80 (1989); *Wolf v. National Shopmen Pension Fund*, 728 F.2d 182 (3rd Cir. 1984); *Carr v. Trustees of Hotel and Restaurant Employees and Bartenders International Union Pension Fund*, 585 F. Supp. 949 (E.D. Pa. 1984); *Donovan v. Carlough*, 576 F. Supp. 245 (D.D.C. Dir. 1983); *De Jesus v. General Motors Acceptance Corp.*, 645 F. Supp. 146 (D. Puerto Rico 1986); *Policy v. Powell Pressed Steel Co.*, 770 F.2d 609, 612-13 (6th Cir. 1985); *Thonen v. McNeil-Akron, Inc.*, 661 F. Supp. 1252 (N.D. Ohio 1986); *Burditt v. Western*

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<sup>9</sup>Pages 14-15 of The Amicus Brief for the United States Supporting Respondents in *Bruch* stated of any attempted creation of such an ERISA trust:

In any event, language in a plan document purporting to give biased administrators unbounded discretion to decide what the terms of a plan mean . . . would not be enforceable under ERISA. Exculpatory language in plan documents "purport[ing] to relieve a fiduciary from responsibility or liability" is expressly "void as against public policy" (29 U.S.C. 1110(a)). Similarly, language granting biased administrators unfettered discretion to determine who would receive benefits would be in tension with ERISA's judicial review and disclosure provisions. The disclosure provisions are designed so that a plan participant will know "exactly where he stands" (S. Rep. 93-127, 93d Cong., 1st Sess. 29(1973); H.R. Rep. 93-533, 93d Cong., 1st Sess., 11 (1973)), and *participants cannot really know where they stand if biased administrators have discretionary authority, to which courts must defer, to construe plan terms.*

(Emphasis added).

*Growers Pension Plan*, 636 F. Supp. 1491 (C.D. Cal. 1986), *aff'd*, 818 F.2d 698 (9th Cir. 1987).<sup>10</sup>

*Bruch* compels the conclusion that even trustees granted discretionary powers to construe trust terms may only do so in compliance with common law trust principles of construction: specifically, only "uncertain terms" are subject to construction, *Bruch, supra*, 109 S. Ct. at 954-55, and trust "terms" are established by written trust text "and such other evidence of the intention of the settlor with respect to the trust as is not inadmissible." *Bruch, supra*, 109 S. Ct. at 955 (Emphasis added).

In *Donovan, supra*, the Court expressly held that an ERISA trustee may only resort to the text of plan terms to justify its meaning of *clear* plan provisions. *Donovan, supra*, 576 F. Supp. at 249. In *Schultz v. Metropolitan Life Ins. Co.*, 872 F.2d 676 (5th Cir. 1989) (decided May 12, 1989) a different panel of the Fifth Circuit affirmed an ERISA claim denial with language that supports the conclusion that *only* when two (2) different and reasonable interpretations are found in *plan terms* may parol evidence properly be examined by the trustee. *Schultz, supra*, 872 F.2d at 679.<sup>11</sup>

If ERISA trustees are not bound by ordinary common law rules of trust construction and are free, as the Circuit Court expressly held, to undertake to legally construe or embellish

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<sup>10</sup>In his concurring opinion in *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 105 S. Ct. 3085, 87 L.Ed 2d 96 (1985), Justice Brennan concludes that the language of ERISA and its legislative history shows Congress intended that administration of ERISA plans be viewed as a matter of "strict fiduciary obligations" as in the common law of trusts. *Massachusetts Mut. Life Ins. Co. v. Russell, supra*, at 105 S. Ct. 3095-96 n. 8. The use of an abuse of discretion standard to review an ERISA fiduciary's alleged breach of his "strict" legal duties under 29 U.S.C.A. §1104(a)(1)(D) seems in direct conflict with the section itself, 29 U.S.C.A. §1110(a), and this Court's holding in *Russell*.

<sup>11</sup>In the case at bar no argument is even made that a second meaning on the coverage issue can reasonably be found within the text of the Plans, only that, with the aid of extrinsic evidence, the "meaning" found by the administrator is reasonable.

upon unambiguous clear ERISA trust terms, grave violence, exempt from judicial review, will be done to the ERISA property right benefits of millions of claimants who, as Petitioner, often have devoted the entirety of their adult working life in reliance on terms found in their employer's retirement plans.

## II.

### **THE COURT OF APPEALS ERRED IN HOLDING A BIASED TRUSTEE MAY CLAIM PETITIONER'S BRUCH-CREATED RIGHT TO COMPLAIN OF TRUSTEE CONFLICTS WAS WAIVED BY FAILURE TO RAISE POINTS OF ERROR, PRE-BRUCH, ALLEGING TRUSTEE CONFLICT AS PART OF THE JUDICIAL REVIEW TEST UNDER ERISA.**

The Court of Appeals ruled that because Petitioner failed to present a point of error in his original appeal regarding the Respondent administrator's undisputed conflict of interest and the legal effect such would have on the application of the arbitrary and capricious standard, that the *Bruch* holding was waived as to Respondent's conflicts. *Lowry v. Bankers Life and Cas. Co. Retirement Plan*, 871 F.2d 522 (5th Cir. 1989). Such holding is in conflict with *Bruch* and should be reversed.

It must be remembered that no Fifth Circuit case, prior to *Bruch*, had ever held that showing an administrator's bias in the form of his actual or potential conflict of interest operated to relax or abate the strict deference then judicially granted fiduciary ERISA administrator's claim denials under the arbitrary and capricious test. Although the Court of Appeals states that conflict was "material to judicial review under our circuit's pre-*Bruch* arbitrary and capricious standard" the Court failed to cite a single case where administrator bias or conflict was listed as a "factor" by the Fifth Circuit and Petitioner has found none. Rather, the

decision of the Third Court of Appeals in *Bruch* appears to be the first time any court, before *Bruch*, had refused to apply the arbitrary and capricious review standard to defer to a claim denial by a biased ERISA administrator. It can hardly be due judicial process to hold Petitioner waived consideration of bias and conflicts as part of a post-*Bruch* review because he failed to foretell this Court's *Bruch* holdings. This ruling is yet another area where the Court of Appeals' decision avoids the *Bruch* holding and directly conflicts with both its letter and spirit in an attempt to retain, to the full extent possible, an absolute judicial deference concept seen only in the now abandoned arbitrary and capricious review standard.

### III.

#### **THE COURT OF APPEALS ERRED IN HOLDING THE TERMS OF THE ERISA TRUSTS ADEQUATELY CREATE INDEPENDENT ADMINISTRATORS GRANTED IRREVOCABLE PLENARY DISCRETION TO CONSTRUE PLAN TERMS AS CONTEMPLATED BY *BRUCH*.**

Apart from the question whether the expanded purpose of the trust language granted by the lower courts in the case at bar is void as against public policy, as set forth in Section I, *supra*, the opinion of the Court of Appeals on rehearing conflicts directly with this Court's holding in *Bruch* when it holds that the trust instruments in the case at bar indeed create the kind of independent objective ERISA administrator, clothed with irrevocable and plenary fiduciary discretion to construe plan terms, as was contemplated and approved by this Court in *Bruch*.

No factual dispute exists in the record that the settlor of the ERISA trusts in question, Bankers Life and Casualty Company, is the administrator of the Retirement Plan and the Savings Plan.<sup>12</sup> Pursuant to *Bruch*, the text of the Plans

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<sup>12</sup>See Bankers Life and Casualty Company Retirement Plan, Appendix p. 1e, Sec. 8.1; see Bankers Life and Casualty Company Savings Investment Plan, Appendix, p. 1f, Sec. 10.1.

become material to determine whether the ERISA trusts contain the contemplated "explicit" terms of delegation to independent plan administrators of irrevocable plenary fiduciary discretion to construe *uncertain* plan terms as would require the judicial deference contemplated by *Bruch*.

Petitioner submits they clearly do not. The only language in the ERISA trusts in question that would fulfill this requirement is found, with regard to the Retirement Plan, in the general administration section at Sec. 8.1. It is there stated:

8.1 *General Administration.* The Company shall be the "administrator" under ERISA responsible for reporting and disclosure concerning the Plan. The Plan shall be administered by the Company through a Committee of one or more persons appointed by the Company *which shall have such powers and duties as may be delegated to it by the Company*, including, but not limited to, authority:

(a) to determine all questions arising in such administration, including the power to determine the rights or eligibility of Employees and Participants and their beneficiaries and the amounts of their respective interests; and its decision thereon shall be binding upon all persons;

Bankers Life and Casualty Company Retirement Plan, Appendix p. 1e. (Emphasis added)

The Savings Plan contains the following language:

10.1 *Appointment of Committee.* The Plan shall be administered by a Pension Plan Committee consisting of at least three persons who shall be *appointed by and serve at the pleasure of the Board of Directors of the Company*; *provided*, that during any vacancy, the remaining Committee members or member shall have and may exercise all powers of the Committee. All usual and reasonable expenses of the Committee may be paid in whole or in part by the Company, and any expenses not paid by the Company shall be paid by the Trustee. Members of the Committee shall not

receive compensation from the Plan with respect to their services for the Committee.

10.2 *Administration of the Plan.* The Committee shall be charged with the general administration of the Plan. The Committee shall have all powers necessary to discharge the duties conferred upon it by the Plan including, but not by way of limitation, the powers to establish rules not inconsistent with the Plan for the purpose of administering it; to *interpret and construe the Plan*; to determine all questions of eligibility and status under the Plan; and to delegate to any investment manager such discretionary or ministerial powers and authority with respect to the investment and reinvestment of the Fund as may be deemed to be appropriate. Except as provided in Section 10.04, the decisions of the Committee shall be final and binding on all persons interested in the Plan.

Bankers Life and Casualty Company Savings Investment Plan, Appendix, p. 1-2f. (Emphasis added)

Petitioner submits that these Plan provisions fall seriously short of *Bruch*-established requirements to mandate judicial use of an abuse of discretion standard in reviewing the administrator's claim denials. The language of this Court in *Bruch* states that the concept of *independent and objective* fiduciary discretion is mandated by the language and terminology of the ERISA statute. Citing *Central States Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 568, 105 S. Ct. 2833 at 2839 (1985), the unanimous *Bruch* court characterizes the type trust language necessary to create fiduciary review by an abuse of discretion standard:

The trustee's determination that the trust documents authorize their access to records here in dispute has significant weight *for the trust agreement explicitly provides* that "any construction [of the agreements provisions] adopted by the Trustees in good faith shall be binding upon the Union, Employees, and Employers."

*Bruch*, *supra*, 109 S. Ct. 954 (Emphasis added)

In *Bruch*, this Court established that a *de novo* standard of judicial review is appropriate for denial of ERISA benefit claims under 29 U.S.C.A. 1132(a)(1)(B) (West 1985), unless "the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." *Bruch*, *supra*, 109 S. Ct. at 956.

The question now presented is whether the Plans at issue sufficiently establish an independent ERISA administrator and grant such explicit irrevocable fiduciary authority to construe uncertain plan terms as would comply with the language and spirit of *Bruch*.

Sec. 8.1 of the Retirement Plan states that the administration shall be "by the Company through a Committee," and the Committee "shall have such powers and duties as may be delegated to it by the Company." This appears to be a contemplation of future grant of authority, not a present irrevocable delegation thereof, contemplated by *Bruch*. No evidence exists in the record that the settlor in the case at bar ever made such irrevocable delegation to the Plan Committee and the statement that the company has the authority to do so should not be held to create the kind of independent fiduciary whose conduct is reviewable only by an abuse of discretion standard.

Additionally, 8.1 of the Retirement Plan fails to speak to the right of the Plan Committee to construe plan terms. Rather, it speaks only to determination of "questions arising in such administration" and "the power to determine the rights or eligibility of" employees and participants. Therefore, on its face it would appear that the power to construe plan terms was not covered by the text of 8.1.

Sec. 10.2 of the Savings Plan, on the other hand, does contain reference to the Committee's power "to interpret and construe the Plan." However, the Committee, once again, is, pursuant to 10.1 of the Savings Plan, to be "appointed by and to serve at the pleasure of the Board of Directors of the Company." While the Savings Plan might contain necessary words purporting to grant the power to interpret and construe plan terms, it does so with the caveat that such shall be "at the pleasure of the Board of Directors of the Company."

In short, the concept of an independent unbiased ERISA fiduciary being granted plenary and unfettered discretion to construe uncertain plan terms located within the ERISA trust documents, as was approved by *Bruch*, is in no way achieved by the appointment of committees subservient to the employer and its Board of Directors. All of the committee's "powers" are clearly revocable and subject to modification, review and retraction by the employer if it is displeased. This form of "delegation" is not, Petitioner submits, the contemplation of *Bruch*. The Court of Appeals holds to the contrary, and its decision is in *direct conflict with the Bruch* decision.<sup>13</sup>

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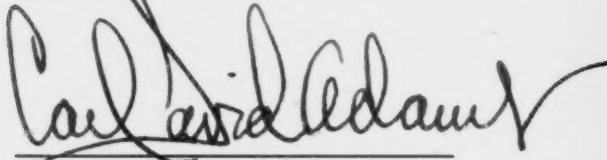
<sup>13</sup>It must also be remembered that the so-called "independent" fiduciary granted judicial deference under the abuse of discretion standard by the Court of Appeals is in fact operating under an undisputed conflict of interest which this Court decreed in *Bruch* "must be weighed as a factor in determining whether there is an abuse of discretion," 109 S. Ct. 956, but which the Fifth Circuit Court held Petitioner waived by failing to anticipate the *Bruch* decision. See section II, *supra*.

### CONCLUSION

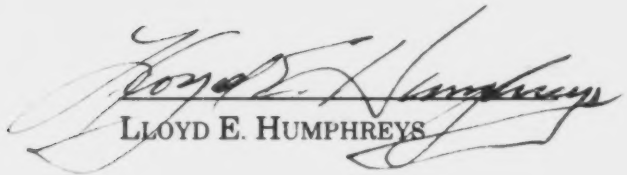
For the foregoing reasons, this petition for certiorari should be granted.

Respectfully submitted,

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A handwritten signature in cursive script, reading "Carl David Adams", written over a horizontal line.

CARL DAVID ADAMS

A handwritten signature in cursive script, reading "Lloyd E. Humphreys", written over a horizontal line.

LLOYD E. HUMPHREYS



**APPENDIX A**

**DONALD A. LOWRY, Plaintiff-Appellant,**

**v.**

**BANKERS LIFE AND CASUALTY  
RETIREMENT PLAN, et al.,  
Defendants-Appellees.**

**No. 88-1164.**

United States Court of Appeals,  
Fifth Circuit.

Feb. 17, 1989.

Employee brought action under Employee Retirement Income Security Act against pension plan committee seeking additional retirement benefits based on overwrite commissions that he received as general insurance agent for employer. The United States District Court for the Northern District of Texas, Samuel Ray Cummings, J., 678 F.Supp. 635, entered judgment for committee, and employee appealed. The Court of Appeals, Goldberg, Circuit Judge, held that committee's determination that overwrite commission income was not within scope of plan was not arbitrary and capricious.

**Affirmed.**

**1. Pensions — 84**

Actions of employee benefit plan committee must be upheld in face of ERISA challenge unless employee proves that committee has acted in arbitrary and capricious manner. Employee Retirement Income Security Act of 1974, § 404, 29 U.S.C.A. § 1104.

**2. Pensions — 84**

Among factors which trial court should consider in evaluating employee benefit plan committee's conduct under arbitrary and capricious standard, in addition to whether committee's interpretation of plan is in direct conflict with

express language in plan, are whether committee has uniformly construed plan, whether committee's reading of plan is "fair reading" and whether reading is reasonable, and whether alternative reading would result in unanticipated costs. Employee Retirement Income Security Act of 1974, § 404, 29 U.S.C.A. § 1104.

### **3. Labor Relations — 41**

ERISA looks with favor upon trustees' using their discretionary powers in good faith to solve problems arising under their guardianship. Employee Retirement Income Security Act of 1974, § 404, 29 U.S.C.A. § 1104.

### **4. Labor Relations — 131**

Pension plan committee's refusing to award employee additional retirement benefits based on overwrite commissions that he received as general insurance agent was not arbitrary and capricious, in view of plan's failure to define "remuneration" which fell within scope of plan, committee's uniformly construing plan, substantial unanticipated costs to plan which would result from inclusion of overwrite commission income, and belief of committee members that they would jeopardize plan's qualified status under Internal Revenue Code if they included overwrite commissions in calculation of benefits. Employee Retirement Income Security Act of 1974, § 404, 29 U.S.C.A. § 1104.

Appeal from the United States District Court for the Northern District of Texas.

Before GOLDBERG, HIGGINBOTHAM and DAVIS, Circuit Judges.

GOLDBERG, Circuit Judge:

This appeal concerns a claim for benefits under qualified pension plans regulated by the Employee Retirement Income Security Act ("ERISA"). The case was brought under 29 U.S.C. § 1132 (1982). The district court's opinion is published at 678 F.Supp. 635 (N.D.Tex.1988).

Appellant Donald Lowry ("Lowry"), seeks additional retirement benefits based on overwrite commissions that he

received in 1979 as a general insurance agent for appellee Union Bankers Insurance Company ("Union Bankers"), an affiliate of appellee Bankers Life Insurance Company ("Bankers"). Lowry argues that the members of the appellee Plan Committee violated their fiduciary duties under ERISA, 29 U.S.C. § 1104 (1982), by refusing to include the amount of the overwrite commissions in the calculation of his pension benefits. His sole claim is that certain disputed Plan language entitles him on its face to additional benefits.<sup>1</sup>

Lowry was an employee of Bankers Life or its affiliates from 1950 until he retired in 1986. From March 15, 1979 through December 15, 1979, Lowry acted as a general agent for Union Bankers pursuant to a general agent's contract. At all relevant times, in accordance with the Plan, Bankers made contributions based on Lowry's salary and personal production commissions. However, Bankers did not contribute to Lowry's retirement account for the overwrite commissions that Lowry earned pursuant to his general agent's contract.

As noted, Lowry depends solely on certain language in the Plan for his argument that he is entitled to additional benefits based on the overwrite commissions. The Retirement Plan in effect during the relevant time period states in part:

(h) *Compensated Employee*. The term "Compensated Employee" shall mean a person in the employ of an Employer or an Affiliate who receives Compensation. A person who acts solely in the capacity of an "Insurance Agent", or who is a trainee for that position, shall not be considered to be a Compensated Employee for the purposes of the Plan.

(i) *Compensation*. The term "Compensation" shall mean the total currently taxable remuneration paid by the Employers and the Affiliates to a Compensated Employee for services rendered. Compensation shall

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<sup>1</sup> Appellees include the Bankers Life and Casualty Retirement Plan and the Bankers Life and Casualty Savings Investment Plan. The dispute centers on the Retirement Plan. For ease of reference, we shall refer simply to the "Plan".

also include any amount contributed at a Participant's election under a Plan that is qualified under Section 125 or 401(a) of the [Internal Revenue] Code, but not any Employer contribution determined on the basis of the contributions made at the Participant's election or otherwise. Notwithstanding the foregoing, Compensation shall not include any payments made pursuant to an insurance agent or agency contract between the Company or the Affiliate and the payee; *provided*, that subsequent to February 28, 1977, Compensation shall include remuneration paid pursuant to insurance agent or agency contracts provided that the payee, at the time of payment, is employed on the home office payroll, or as a Field Manager, or as a field office clerical employee of the Company or an Affiliate.

Lowry contends on appeal (1) that the income he received as a general agent in the form of overwrite commissions constitutes "remuneration" and "compensation" under the Plan; (2) that the income was remuneration paid "pursuant to an insurance agent or agency contract;" and (3) that he was on the "home office payroll . . . of the Company or an Affiliate" at the time of remuneration.

[1] We must fit our inquiry in this case into the well-cut garments woven by earlier opinions of this Circuit. The actions of a Plan Committee must be upheld unless a plaintiff proves that the Committee has acted in an arbitrary and capricious manner. *Dennard v. Richards Group*, 681 F.2d 306, 313 (5th Cir.1982); *Denton v. First National Bank of Waco*, 765 F.2d 1295, 1304 (5th Cir.1985). This strict standard limits excessive judicial intervention in the administration and operation of trusts. *Id.* Discretion is a touchstone of trusteeship, and we invade the province of the trustee only when he violates the proper exercise of his discretion.

[2] In determining whether the actions of a Plan Committee are arbitrary and capricious, a district court "should engage in a two-step process. First, the court must determine the correct interpretation of the plan's provisions." *Denton*, 765 F.2d at 1304; *Dennard*, 681 F.2d at 314. "Second, the court must determine whether the Plan administrators acted arbitrarily or capriciously in light of the

interpretation they gave the Plan in the particular instance." *Denton*, 765 F.2d at 1304. "[T]he trial court must focus on the evidence that was before the Plan Committee when the final benefit determination was made." *Id.* "The fact that a trustee's interpretation is not the correct one as determined by a District Court does not establish in itself arbitrary and capricious action, but is a factor in that determination. When the trustees' interpretation of a plan is in direct conflict with express language in a plan, this action is a very strong indication of arbitrary and capricious behavior." *Dennard*, 681 F.2d at 314.

Other "factors which the trial court should consider in evaluating conduct under the arbitrary and capricious standard" include (1) whether the Committee has uniformly construed the Plan; (2) whether the Committee's reading of the Plan is a "fair reading" and whether the reading is a reasonable one; and (3) whether an alternative reading would result in unanticipated costs. *Denton*, 765 F.2d at 1304, citing *Dennard*, 681 F.2d at 314. And, "[a]long with the determination of the 'legally' correct meaning of the Plan provision in question, we also view as probative of the good faith of a trustee or administrator the following factors: (1) internal consistency of a Plan under the interpretation given by the administrators or trustees; (2) any relevant regulations formulated by appropriate administrative agencies . . . and (3) factual background of the determination by a Plan and inferences of lack of good faith, if any." *Denton*, 765 F.2d at 1304 (quoting *Dennard*, 681 F.2d at 314 (additional citation omitted)).

[3] The common law looked with favor upon trustees using their discretionary powers in good faith to solve problems arising under their guardianship. So does ERISA. While we will never abdicate our duty of review, and allow a Plan Committee to play fast and loose with the words of an instrument, we nevertheless keep our eyes firmly fixed on the arbitrary and capricious standard, keenly aware of the discretion that must necessarily be exercised by trustees.

[4] As noted, Lowry, maintains that the disputed Plan language is so clear on its face that it requires us to reverse the district court's decision and hold that the actions of the

Plan Committee in this case are arbitrary and capricious. That is, Lowry believes that this is a case where the clear language of a plan stands as a factor subsuming all others in the second step of the *Dennard* test. See *Dennard*, 681 F.2d at 314-16. We disagree. The district court's discussion of the Plan demonstrates that the Plan Committee's interpretation is "reasonably deducible from the words used" and is within the "realm of reasonable interpretations of the plan." *Tulley v. Ethyl Corporation*, 861 F.2d 120, 123 (5th Cir. 1988).

Although Lowry argues that the Plan language is crystal clear on its face, we believe that the district court was correct in its belief that the meaning of the terms "compensation", "remuneration" and "home office payroll" could not be determined in a vacuum. See *Lowry v. Bankers Life and Casualty Retirement Plan*, 678 F.Supp. 635, 640-42 (N.D.Tex.1988); cf. *Leach v. FDIC*, 860 F.2d 1266, 1270 (5th Cir.1988) ("even apparently plain words ... may not accurately convey the meaning the creators intended to impart"). For example, the district court correctly found room for interpretation of the Plan in finding that the "Plan itself does not define 'remuneration' which is susceptible to different meanings." 678 F.Supp. at 640. The district court properly found that the term "remuneration" in the disputed provision "was aimed at field managers and other agents based upon *personal production*, not commissions earned because of the production of [sub-agents to a general agent]." *Id.* at 641 (emphasis in original). Thus, the district court correctly interpreted the Plan in this case to mean that the overwrite commission income of general agents does not fall within the scope of the Plan language.<sup>2</sup>

This is not the case, then, where a Plan's language inexorably compels a particular interpretation and any other

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<sup>2</sup>The district court expressly concluded that the term "home office payroll" created an ambiguity which itself mandated deference to the Committee's interpretation of the disputed language. *Lowry*, 678 F.Supp. at 641-42. Although the district court failed to define the term, this is not a fatal error under *Dennard* under the circumstances of this case because the district court was able to make a correct interpretation of the Plan based on its construction of the terms "compensation" and "remuneration."

one is "so far removed from the realm of reasonable interpretation of the plan that we are compelled to find [the Plan Committee's determination] invalid." *Tulley v. Ethyl Corporation*, 861 F.2d 120, 123 (5th Cir.1988); accord *Matter of HECI Exploration Co.*, 862 F.2d 513, 524-25 (5th Cir. 1988).

Given that the disputed Plan language in this case is not crystal clear on its face and does not exist in a vacuum, we are satisfied that the numerous factors outlined in *Denton* and *Dennard*, and applied by the district court, properly guided the district court's inquiry and support its conclusion that the actions of the Plan Committee in this case were not arbitrary or capricious under the circumstances.

For example, the district court properly found that the Committee had uniformly construed the Plan, and that inclusion of general agent overwrite commission income would result in substantial unanticipated costs to the Plan. In addition, after significant consideration, the members of the Plan Committee determined that they would jeopardize the Plan's qualified status under the Internal Revenue Code if they include Lowry's general agent overwrite commissions in a calculation of his benefits. In making this determination, they relied on counsel's interpretation of a Revenue Ruling, RR 69-569. See 678 F.Supp. at 642.

Revenue Ruling 69-569 concerns an attorney who was employed by a corporation while receiving self-employment income. The Ruling states that the attorney, as an employee of the corporation, could participate in the plan without disqualifying it, but that his "contribution's [sic] or benefits under the plan are to be based only on the amount he receives as an employee of the corporation." Counsel, as well as the expert witness for the Plan Committee and the other appellees at the bench trial, interpreted this Ruling to mean that general agents, under the Plan involved in this case, could not participate in the plan based on their overwrite commission income, but could participate in the plan without disqualifying it based on salary and personal production income, as Lowry did in this case.

Nothing in the record suggests that the Plan Committee acted in bad faith in relying on counsel's determination. We ask only whether the Committee's reliance on counsel's

reading of the Ruling was reasonable. *Denton*, 765 F.2d at 1304. We believe the Committee's actions meet this reasonableness standard.

After reviewing the determination of the Plan Committee under the circumstances of this case, in light of the factors outlined in *Dennard* and *Denton*, we hold that the Committee's determination was not arbitrary and capricious. Therefore, the judgment of the district court must be AFFIRMED.<sup>3</sup>

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<sup>3</sup>We hold only, and we read the opinion of the district court as holding only, that the actions of the Plan Committee under the particular circumstances of this case were not arbitrary and capricious. We find it unnecessary to reach broader questions of law under ERISA and the Internal Revenue Code such as, for example, whether the overwrite commission income earned by a general insurance agent may ever be included in a benefits calculation under a qualified pension plan without jeopardizing the qualified status of the plan.

**APPENDIX B**

**DONALD A. LOWRY, Plaintiff-Appellant,**

**v.**

**BANKERS LIFE AND CASUALTY  
RETIREMENT PLAN, et al.,  
Defendants-Appellees.**

**No. 88-1164.**

United States Court of Appeals,  
Fifth Circuit

April 28, 1989.

In action seeking benefits under savings and retirement plans, the United States District Court for the Northern District of Texas, 678 F.Supp. 635, Samuel Ray Cummings, J., held that actions of plan administrators were not arbitrary and capricious. On appeal, the Court of Appeals, 865 F.2d 692, affirmed. On petition for rehearing, construed as petition for panel rehearing, the Court of Appeals held that: (1) de novo review of actions of plan administrators was inappropriate, and (2) plan administrators did not abuse their discretion in denying claim.

Petition denied.

**1. Pensions — 84**

De novo review of actions of plan administrators was inappropriate, where terms of plans mandated deference to plan administrators; rather question was whether administrator's actions were arbitrary and capricious. Employee Retirement Income Security Act of 1974, § 502(a)(1)(B), 29 U.S.C.A. § 1132(a)(1)(B).

**2. Pensions — 136**

Plan administrators did not abuse their discretion in denying claim for benefits under savings and retirement plans. Employee Retirement Income Security Act of 1974, § 502 (a)(1)(B), 29 U.S.C.A. § 1132 (a)(1)(B).

### 3. Federal Courts — 744

Claim that plan administrator had conflict of interest, raised for first time in petition for rehearing, would not be considered.

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Carl D. Adams, Boyd & Adams, Dallas, Tex., for plaintiff-appellant.

Stuart M. Reynolds, Jr., Jennifer Bolen-Almquist, Moore & Peterson, Dallas, Tex., for defendants-appellees.

Appeal from the United States District Court for the Northern District of Texas.

(Opinion Feb. 17, 1989, 5th Cir.1989, 865 F.2d 692)

#### ON PETITION FOR REHEARING

Before GOLDBERG, HIGGINBOTHAM and DAVIS,  
Circuit Judges.

#### PER CURIAM:

[1] In his petition for rehearing, which we construe as a petition for panel rehearing, the appellant, Donald Lowry, argues that the Supreme Court's decision in *Firestone Tire & Rubber Co. v. Bruch*, — U.S. —, 109 S.Ct. 948, 103 L.Ed.2d 80 (1989), mandates a rehearing in this case. *Bruch* holds that courts should apply a *de novo* standard of review in ERISA actions under 29 U.S.C. § 1132(a)(1)(B) (1982) unless the terms of the trust instrument require deference to plan administrators. Because the terms of the plans in this case make a *de novo* standard inappropriate, we deny the petition for panel rehearing, adding these words to supplement our previous decision.<sup>1</sup>

The appellant, Donald Lowry, brought this action seeking benefits that the appellee plan administrators denied to him

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<sup>1</sup>We assume that *Bruch* applies retroactively to our decision, and we consider its effect, despite the appellant's failure to raise the *de novo* issue at any earlier point in these proceedings, because it raises important questions of law.

under their reading of the terms of the Bankers Life Savings and Retirement Plans.<sup>2</sup> 29 U.S.C. § 1132(a)(1)(B) (1982). Applying the test set forth in *Dennard v. Richards Group*, 681 F.2d 306, 314 (5th Cir.1982), the district court held that the actions of the plan administrators were not arbitrary and capricious. *Lowry v. Bankers Life*, 678 F.Supp. 635 (N.D.Tex.1988). We affirmed in a brief opinion. *Lowry v. Bankers Life*, 865 F.2d 692 (5th Cir.1989).

Four days after we issued our decision, the Supreme Court issued its opinion in *Firestone v. Bruch*, — U.S. —, 109 S.Ct. 948, 103 L.Ed.2d 80. In *Bruch*, the petitioner, Firestone Tire & Rubber ("Firestone"), sold one of its divisions to Occidental Petroleum. Six Firestone employees in the division, who were rehired by Occidental, sought severance benefits under Firestone's unfunded termination pay plan. The plan provided that "If your service is discontinued prior to the time you are eligible for benefits, you will be given termination pay if released because of a reduction in work force." — U.S. at —, 109 S.Ct. at 951. Determining that the sale did not constitute a "reduction in work force" within the meaning of the termination pay plan, Firestone denied severance benefits. The respondents then filed a class action under 29 U.S.C. § 1132(a)(1), seeking *inter alia*, severance benefits on the ground that the sale constituted a "reduction in work force" under the terms of the termination pay plan.

The district court granted summary judgment to the employer on the denial of severance benefits, holding that Firestone's decision under the plan was not arbitrary or capricious. The Third Circuit reversed, holding that "where an employer is itself the fiduciary and administrator of an unfunded benefit plan, its decision to deny benefits should be subject to *de novo* judicial review." — U.S. at —, 109 S.Ct. at 952.

The Supreme Court affirmed the Third Circuit's result on the standard of review issue. Making clear that the lower courts had erroneously imported an arbitrary and capricious

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<sup>2</sup>The appellant claims that he is entitled to certain benefits under both the Savings Plan and the Retirement Plan. The bulk of the contested benefits concern the Retirement Plan.

standard of review into § 1132(a)(1)(B) determinations under ERISA, the Court held that a “denial of benefits challenged under § 1132(a)(1)(B) is to be reviewed under a *de novo* standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan.” — U.S. at \_\_\_, 109 S.Ct. at 956. In other words, § 1132(a)(1)(B) provides an independent federal cause of action to enforce contractual rights under a plan instrument, and the scope of judicial review in such a contract action is *de novo*, unless the terms of the plan require deference to the acts of plan administrator.<sup>3</sup> The Court held in addition that “if a benefit plan gives discretion to an administrator or fiduciary who is operating under a conflict of interest, that conflict must be weighed as a ‘factor in determining whether there is an abuse of discretion.’ ” *Id.* (citation omitted).

Courts adjudicate controversies, and one of their primary adjudicative functions in common contract disputes is to render an authoritative *de novo* interpretation of an instrument’s language. At common law, if a reviewing court determined that the terms of a plan instrument did not provide for a plan administrator’s discretionary exercise of power when interpreting a trust instrument or making eligibility determinations, the court did not grant deference to the plan administrator in reviewing her interpretations and actions. Thus, before the passage of ERISA, courts reviewed the acts of plan administrators under a *de novo* standard where the terms of the instrument did not provide for the permissive exercise of a plan administrator’s power. *Bruch*, \_\_\_ U.S. at \_\_\_, 109 S.Ct. at 955 (“If the plan did not give the employer or administrator discretionary or final authority to construe uncertain terms, the court reviewed the employee’s claim as it would have any other contract claim — by looking to the terms of the plan and other manifestations of the parties’ intent” (citing cases)). On the

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<sup>3</sup>Because of our disposition of this case, we have no occasion, of course, to consider the principles of construction appropriate to *de novo* review of benefits determinations challenged under 29 U.S.C. § 1132(a)(1)(B). We assume that *Bruch* mandates the development of a body of federal common law applicable to *de novo* review in § 1132(a)(1)(B) actions.

other hand, before ERISA's implementation, courts gave deference to administrators' decisions when the terms of the instrument provided for discretionary authority. See, e.g., *Smith v. New England Telephone*, 109 N.H. 172, 246 A.2d 697, 698 (1968) (arbitrary and capricious standard appropriate where a plan gave the committee "authority to 'determine conclusively for all parties all questions arising in the administration of the Plan' ").

*Bruch* instructs us that Congress did not intend to restrict the common law rights of employees when it enacted 29 U.S.C. § 1132(a)(1)(B) as part of ERISA. The *Bruch* Court made clear that the wholesale importation of an arbitrary and capricious standard of review in § 1132(a)(1)(B) actions erroneously "afford[ed] less protection to employees and their beneficiaries than they enjoyed before ERISA was enacted." — U.S. at —, 109 S.Ct. at 956.

With *Bruch's* teachings in mind, we analyze the distinctions between the plan instrument in *Bruch* and the plan instruments in this case. The termination pay plan in *Bruch* did not grant discretionary power to the Company/Administrator to interpret the plan. In particular, the plan did not grant the administrator discretionary power to interpret the all-important phrase "reduction in work force." Because the plan was silent with respect to the administrator's permissive interpretive power, the Court held a *de novo* standard appropriate to review the administrator's acts, consistent with the common law decisions predating ERISA's enactment.

The instruments in this case sharply contrast with the termination pay plan in *Bruch*. The Bankers Life Savings Plan grants permissive authority to the Plan Committee to "interpret and construe" the Savings Plan and the power "to determine all questions of eligibility and status under the Plan." The Bankers Life Retirement Plan grants to the Plan Committee the power to "determine all questions arising" in the administration of the Plan, "including the power to determine the rights or eligibility of Employees and Participants and their beneficiaries, and the amounts of their respective interests." Both Plans provide that Committee determinations are binding on all persons, subject to the

claims procedures under the Plans by which the Committee decides appeals from claim denials.<sup>4</sup>

Like the court in *Smith*, 246 A.2d 697, 698, we believe that the unambiguous language in the Plans mandates deference to the plan administrators under the circumstances of this case.<sup>5</sup> Unlike in *Bruch*, there is “evidence that under” the trust instruments “the administrator has the power to construe uncertain terms [and] that eligibility determinations are to be given deference.” *Bruch*, — U.S. at —, 109 S.Ct. at 954.

[2] Given the language of both the Savings and Retirement Plans, then, *Bruch* dictates that an abuse of discretion standard should apply in this case. *Bruch*, — U.S. at —, 109 S.Ct. at 954-55. Our earlier opinion and the opinion of the district court make clear that the plan administrators in this case did not abuse their discretion. Consequently, we find it unnecessary at this point to determine whether the abuse of

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<sup>4</sup>The appellant argues as a threshold matter that a *de novo* standard should apply under *Bruch* because the Plans do not delegate particular, defined decisionmaking power to the Plan Committees. Apparently, the appellant is arguing that the Plans say nothing about where actual decisionmaking authority lies, and that we should interpret this alleged lack of clarity as silence vis-a-vis the administrators’ discretionary power, thus mandating *de novo* review. We read the applicable provisions to state clearly that the Committees’ authority includes but is not limited to the authority explicitly provided in the Plans, which we quote in the text. In any event, the district found that the Retirement Plan Committee exercised particular, defined authority, a determination we read as a *de novo* interpretation of the plan. 678 F.Supp. at 639. And although the Company reserves the right under the Plans to expand or contract the authority explicitly delegated to the Committees, this does not affect the terms of the Plans as constituted and as they apply to this case.

<sup>5</sup>We reach our result as a matter of law because the relevant plan language is not ambiguous. In the future, of course, the district courts will determine in the first instance the appropriate standard of review under § 1132(a)(1)(B) in cases involving particular plan instruments. Definitive constructions of plan language in some cases may involve questions of fact. But we have no occasion today to consider (1) whether *Bruch* requires *de novo* review unless a reviewing court determines as a matter of law that the terms of a plan grant discretionary authority to a plan administrator or fiduciary; or (2) whether *Bruch* allows a reviewing court to resolve questions of fact in determining the appropriate standard of review, and if so, what principles of construction are appropriate in the court’s inquiry.

discretion standard envisioned by the *Bruch* court is equivalent to or less strict than our circuit's preexisting arbitrary and capricious standard. *Dennard*, 681 F.2d at 314. In either instance, the result in this case would be identical. Thus, a remand would not serve the interests either of justice or judicial economy in this case.<sup>6</sup>

Because a *de novo* standard does not apply to our review of the plan administrators' acts in this case, we must also address *Bruch's* holding that "if a benefit plan gives discretion to an administrator who is operating under a conflict of interest, that conflict must be weighed as a 'factor[] in determining whether there is an abuse of discretion.'" — U.S. at \_\_\_, 109 S.Ct. at 956 (citation omitted). Under both Plans in this case, the Company is the administrator. Lowry argues that because "the employer is also the person who makes the ERISA decisions, directly or through subservient committees, the employer benefits directly from a denial of benefits . . . [and] its pocketbook will obviously be adversely impacted by any decision granting such benefits." Petition for Rehearing at 8.

[3] Lowry did not present the conflict of interest argument to us on his initial appeal, and we will not consider it now. See, e.g., *Nissho-Iwai Co., Ltd. v. Occidental Crude Sales*, 729 F.2d 1530, 1549 (5th Cir.1984). The appellant cannot justify raising the conflict of interest argument for the first time in his petition for rehearing. A plan administrator's conflict of interest is certainly material to judicial

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<sup>6</sup>We note that "the arbitrary and capricious standard may be a range, not a point. There may be in effect a sliding scale of judicial review of trustees' decisions . . . —more penetrating the greater is the suspicion of partiality, less penetrating the smaller that suspicion is . . . The existence of a sliding scale in judicial review of ERISA trustees' decisions is suggested by the cases that, while purporting to apply a uniform 'arbitrary and capricious' standard, in fact give less deference to a decision the more the trustees' impartiality can fairly be questioned." *Van Boxel v. Journal Co. Employees' Pension Trust*, 836 F.2d 1048, 1052-53 (7th Cir. 1987) (Posner, J.) (citing, *inter alia*, Friendly, *Indiscretion About Discretion*, 31 Emory L.J. 747, 764,784 (1982)). See *Bruch*, — U.S. at \_\_\_, 109 S.Ct. at 950 ("[I]f a benefit plan gives discretion to an administrator or fiduciary who is operating under a conflict of interest, that conflict must be weighed 'as a factor in determining whether there has been an abuse of discretion'" (citation omitted)).

review under our circuit's pre-*Bruch* arbitrary and capricious standard. No one has questioned our circuit's pre-*Bruch* standard in this litigation until the appellant filed his petition for rehearing. Moreover, conflict of interest allegations may involve questions of fact.<sup>7</sup> In contrast, we have considered the effect of *Bruch* on this case, despite the appellant's failure to raise the *de novo* argument below, because our inquiry involves only questions of law. Furthermore, we believe that fundamental fairness justifies our consideration of *Bruch* under the circumstances of this case.

Based on the foregoing discussion, the petition for panel rehearing is DENIED.

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<sup>7</sup>Incidentally, we note that with respect to the unfunded plan at issue in *Bruch*, "every dollar provided in benefits is a dollar spent by . . . Firestone, the employer; and every dollar saved by the administrator on behalf of his employer is a dollar in Firestone's pocket." *Bruch v. Firestone Tire and Rubber Co.*, 828 F.2d 134, 144 (3d Cir.1987). In contrast, the Retirement Plan in this case is a funded, defined-benefit plan. "[I]n these defined-benefit plans, the immediate impact of a decision to grant or deny benefits is on the trust itself and not on the employer; only if the total of all claims paid exceeds the actuarially anticipated amounts would benefit decisions by a trustee have a financial impact on the employer." Brief for Respondents at n. 19, *Firestone Tire & Rubber Co. v. Bruch*, No. 87-1054 (available on LEXIS, Genfed Library, Briefs File).

**APPENDIX C**

**DONALD A. LOWRY, Plaintiff,**

**v.**

**BANKERS LIFE AND CASUALTY  
RETIREMENT PLAN, et al.,  
Defendants.**

**Civ. A. No. CA-3-87-0293-C.**

United States District Court,  
N.D. Texas,  
Dallas Division.

Feb. 9, 1988.

Retired insurance company employee brought action seeking additional retirement benefits. The District Court, Cummings, J., held that plan trustees' determination that employee was not entitled to benefit based on commissions he received while a general agent for employer was not arbitrary or capricious.

Affirmed.

**1. Pensions — 139**

Standard of review in ERISA action is for court to determine whether plan trustees' final benefit determination was arbitrary or capricious. Employee Retirement Income Security Act of 1974, § 2 et seq., 29 U.S.C.A. § 1001 et seq.

**2. Pensions — 122**

Employee retirement plan trustee did not act arbitrarily or capriciously in interpreting plan as denying benefits to insurance company employee based upon overwrite commissions earned while he was general agent, though he remained on company payroll at time he was under general agent's contract; plans provided for contributions only for compensated employees and had never been interpreted as including general agents, who were independent contractors.

### 3. Labor Relations — 122

If both retirement plan trustees and employee offer rational but conflicting interpretation of plan's provisions, trustees' interpretation must be allowed to control. Employee Retirement Income Security Act of 1974, § 2 *et seq.*, 29 U.S.C.A. § 1001 *et seq.*

### 4. Labor Relations — 122

Retirement plan trustees properly relied on revenue ruling as basis for denying benefits to employee, based on over-write commissions arising out of general agent contract, where ruling indicated that retirement plan would not qualify under tax code if it included participants who were employees as well as self-employed, and made contributions based on employee's self-employment income. 26 U.S.C.A. § 401(a).

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Carl David Adams of Adams & Francis, Dallas, Tex., for plaintiff.

Stuart M. Reynolds, Jr., of Moore & Peterson, Dallas, Tex., for defendants.

## MEMORANDUM OPINION

CUMMINGS, District Judge.

This action before the Court is a claim by Donald A. Lowry ("Lowry") for retirement benefits under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. Sections 1001, *et seq.* Lowry has filed suit against Bankers Life and Casualty Retirement Plan ("Retirement Plan"), Bankers Life and Casualty Savings Investment Plan ("Savings Plan"), Bankers Life and Casualty Company ("Bankers"), Union Bankers Insurance Company ("Union") and Robert P. Ewing, Chester M. Lozowski, Paul Janus, Barth Murphy, Paul Higdon, Jack Zimmer, Tom Dunphy, Jim Dentle, Jack Gardiner, and Robert Shaw, as Members of the Pension Plan Committee and/or Fiduciaries (collectively called "Committee") seeking additional retirement benefits based solely on commissions paid to Lowry during or as a result of a nine and one-half month tenure in 1979 as

a general agent for Union. After considering Lowry's claim, the Committee administering the retirement and savings plans (herein collectively called "Plan") denied Lowry's claim for additional benefits which, calculated in the light most favorable to Lowry, were stipulated to be \$384,533.96. Lowry filed his complaint on February 10, 1987, claiming that he was wrongfully denied these additional retirement benefits.

Lowry claims that he is entitled to these additional retirement benefits based on the "plain language" of the documents governing the Plan. Further, Lowry claims that he was a "compensated employee" on the home office payroll for purposes of including such commissions in the retirement Plan calculation because he was subsidized on the home office payroll of Union and/or Bankers at the same time he was paid general agent's commissions.

Lowry was an employee of Bankers or its affiliates, including Union and Certified Life Insurance Company of California, from 1950 until his retirement in 1986. During a nine and one-half month period in 1979, Lowry was a general agent for Union pursuant to a general agent's contract. As an employee of Bankers and its affiliates, Lowry was eligible to participate in the Plans from and after the institution of such Plans in 1960, as amended or modified thereafter, until Lowry's retirement in 1986. In accordance with the Plan, Bankers made contributions based on Lowry's salary and personal production commissions. No contributions were ever made to Lowry's retirement account for the general agent commissions paid to Lowry pursuant to the general agent's contract with Union.

The dispute between the parties is the determination of the meaning of the language found in the Plans in question. The Plan contained the following definitions pertinent to the Plan Committee's review of Lowry's claim:

- (h) *Compensated Employee*. The term "Compensated Employee" shall mean a person in the employ of an Employer or an Affiliate who receives Compensation. A person who acts solely in the capacity of an

"Insurance Agent", or who is a trainee for that position, shall not be considered to be a Compensated Employee for the purposes of this Plan.

- (i) *Compensation.* The term "Compensation" shall mean the total currently taxable remuneration paid by the Employers and the Affiliates to a Compensated Employee for services rendered. Compensation shall also include any amount contributed at a Participant's election under a plan that is qualified under Section 125 or 401(a) of the Code, but not any Employer contribution determined on the basis of the contributions made at the Participant's election or otherwise. Notwithstanding the foregoing, Compensation shall not include any payments made pursuant to an insurance agent or agency contract between the Company or an Affiliate and a payee; *provided*, that subsequent to February 28, 1977, Compensation shall include remuneration paid pursuant to insurance agent or agency contracts provided that the payee, at the time of payment, is employed on the home office payroll, or as a Field Manager, or as a field office clerical employee of the Company or an Affiliate.

Lowry contends that his 1099 overwrite commissions income received under his general agent's contract with Union clearly qualifies as "remuneration," and is compensation under the Plan and that his retirement benefits should have included such 1099 overwrite commissions payments, because the 1099 income was remuneration paid "pursuant to an insurance agent or agency contract" and because he was on the home office payroll of "the Company or Affiliate" at the time of said payments.

#### *Factual Findings*

On March 1, 1979, Lowry decided to sever his employer/employee relationship with Union and/or Bankers and enter into a General Agent's Contract with Union, at which time he knowingly and voluntarily began acting in the capacity of an independent contractor.

To assist in Lowry's transition to his general agency relationship with Union, it was agreed that Union and/or

Bankers would subsidize Lowry's general agency for a definite period of time. A letter agreement dated January 31, 1979, clearly and unambiguously sets forth the terms of the new relationship and, among other things, provides that, Union would provide to Lowry (1) his present salary of \$56,000.00 with no bonus consideration for a period of twelve months beginning March 1, 1979, and ending on February 28, 1980; (2) fifty percent (50%) of his salary for a period of twelve months beginning March 1, 1980, and ending on February 28, 1981; (3) regular and normal expenses; (4) a car allowance in the pursuit of Lowry's recruiting, supervision, and development of business for Lowry's general agency relationship with Union; (5) personal office space and expenses for a secretary for a period of six months beginning March 1, 1979, and ending September 1, 1979, at which time Union would pay only fifth percent (50%) of Lowry's office rent, telephone and utilities; and (6) District Manager's salaries and normal expenses for a four month period of time. Lowry also received a \$20,000.00 bonus for the period January 1, 1979, through February 28, 1979.

In May of 1979, Lowry requested additional support from Union and an extension of the subsidy arrangement for his general agency. Union declined to grant the increase and extension sought by Lowry.

In September of 1979, Union sought to terminate Lowry's general agent's contract and such contract was subsequently terminated effective December 15, 1979.

From and after December 16, 1979, Lowry was on the payroll of Bankers or its affiliate, Certified Life, until his retirement effective March 1, 1986.

At no time did Bankers or its affiliates cease making contributions to the Plan for Lowry's retirement, but such contributions, including those made during 1979, were uniformly and consistently based on his salary and commissions payable to him as a "Compensated Employee" pursuant to the Plan and were not based on overwrite commissions paid to him under the General Agent's Contract.

On March 17, 1986, Lowry accepted a lump sum benefit distribution in the amount \$253,788.98.

Lowry made written demand for the contested additional amount, stipulated to be \$384,533.96. The Plan Committee, in letters dated June 25, 1986, and October 17, 1986, denied the claim and an appeal by Lowry.

After exhausting his administrative remedies, Lowry filed this action under Sections 1001 and 1132 of ERISA (29 U.S.C. §§ 1001 et seq.).

Bankers sells its insurance products through a direct writing sales force. These individuals are "captive" agents who sell only Bankers products and who are compensated by a combination of salary, bonus and certain commissions. The "captive" agents are common law employees of Bankers. Compensation to such employees, at all relevant times herein, has been included by Bankers and its affiliates in calculating contributions to the Plan and in determining benefits to retirees.

Union sells its insurance products primarily through a network of general agents. Such agents are independent contractors who may sell the products of other companies as well as products of Union. General agents are paid by Union based on earned income generated by their personal production and/or by overwrite commissions derived from the production of their employees or sub-agents.

Union's general agents have never been participants in the qualified pension plans and Lowry was aware of this fact prior to his decision to become a general agent.

During 1979, Union paid Lowry \$76,804.93 as salary and personal production renewal commissions from policies previously written by Lowry as an employee of Bankers, pursuant to its agreement contained in the January 31, 1979, letter from John Coffman of Union.

During the period March 1, 1979, through December 15, 1979, Lowry did not earn any commission income based on his own personal production. However, his overwrite commissions in 1979 were \$208,697.37 based on the production of other agents supervised by Lowry under his General Agent's Contract.

The overwrite commissions paid to Lowry in the years 1979 to 1986 and which he asserts should be included in calculating his retirement benefits, total \$585,025.52.

Because it continued to carry Lowry on Union's payroll throughout 1979, pursuant to its agreement to subsidize Lowry's efforts to build a general agency operation, Union made contributions to the Plan based on his salary and permitted him to avoid a "break in service" under the Plan.

General agents are not covered by the Plan. As self-employed individuals, general agents may elect to establish their own retirement plans in which they may include their earned income for purposes of calculating retirement benefits, but may not be included in the qualified Plan for common law employees.

The Plan differentiates employees from persons acting solely in the capacity of an insurance agent or in training for the same. For those persons acting solely in the capacity of an insurance agent or in training for the same, no contributions are made based on compensation paid to those persons because that compensation is not attributable to common law employment.

Subsequent to February 28, 1977, "Compensation" included "remuneration" paid by the Company to a "Compensated Employee" pursuant to insurance agent or agency contracts, provided that the payee at the time of payment is "employed on the home office payroll, or as a field manager, or as a field office clerical employee of the Company or an Affiliate."

Lowry contends that he is entitled to an additional \$384,533.96 in retirement benefits based on the \$585,025.52 of general agent's commissions paid to him pursuant to the general agent's contract because he was a "Compensated Employee" employed on the "home office payroll" at the same time he was a general agent.

Under the Committee's interpretation, Lowry was an eligible Plan participant to the extent he was paid a salary and personal production commissions on business written prior to his general agency relationship with Union. Lowry was

not unique in the classification of him as an ineligible participant in the Plan based on the general agent's commissions paid to Lowry. As noted, neither Bankers nor its affiliates have permitted general agents to participate in the Plan.

Consistent with the treatment of all employees and all general agents, Plan contributions based on Lowry's salary and personal production commissions from his prior employment were made, but Plan contributions based on Lowry's overwrite commissions from his general agency were not.

The Plan provides that the Plan will be administered by a Committee which shall have authority:

(a) To determine all questions arising in such administration, including the power to determine the rights or eligibility of Employees and Participants and their beneficiaries, and the amount of their respective interests; and its decision thereon shall be binding upon all persons;

(b) To adopt such rules and regulations of uniform application as it may deem necessary for the proper administration of the Plan and consistent with its purposes, including procedures for submission of claims and appeal of denied claims.

The Plan further provides that:

This Plan is contingent upon, and subject to, obtaining and retaining the necessary approval of the Commissioner of Internal Revenue under the applicable provisions of the Code.

The Committee construed the Plan so as to exclude general agents from the definition of "Compensated Employee" and general agents' commissions from the definition of "Compensation" under the Plan. The Committee has uniformly construed the Plan to exclude general agents, and the evidence before the Court was to the effect that Lowry had knowledge that general agents were not covered by the Plan. Lowry argued, however, that he was wearing "two hats," one as an employee and one as a general agent, and that because of his "tailormade" situation, his general agent commissions should be covered under the Plan's definition.

*Discussion*

[1] The standard of review in an ERISA action is for the Court to determine whether or not the trustees' determination was arbitrary or capricious. The role of the court is limited in that "the clear weight of federal authority mandates that the trustees' determinations . . . are to be upheld unless arbitrary or capricious." *Denton v. First Nat'l Bank of Waco, Texas*, 765 F.2d 1295, 1303 (5th Cir.1985), citing *Paris v. Profit Sharing Plan for Employees of Howard B. Wolf, Inc.*, 637 F.2d 357, 362 (5th Cir.), cert. denied, 454 U.S. 836, 102 S.Ct. 140, 70 L.Ed.2d 117 (1981). Under the arbitrary and capricious standard, the Court is obligated to focus on the evidence that was before the Plan Committee when the final benefit determination was made. *Denton*, 765 F.2d at 1304.

The Court's review is subject to a two-step process as set out in *Dennard v. Richards Grop, Inc.*, 681 F.2d 306, 314 (5th Cir.1982), wherein the *Dennard* court held that a court must first determine the correct interpretation of the plan's provisions and secondly to determine whether the plan administrators acted arbitrarily or capriciously in the light of the interpretation they gave the plan in the particular instance. *Id.*, at 314. Certain factors have been developed for the trial court to consider in evaluating whether or not the conduct of the plan administrators was arbitrary and capricious. Such factors are those as set forth in *Dennard*, at 314, citing *Bayles v. Central States, Southeast and Southwest Areas Pension Fund*, 602 F.2d 97, 99 (5th Cir.1979), wherein the *Dennard* court stated that:

In *Bayles*, we indicated certain factors to be considered in applying the arbitrary and capricious standard: (1) uniformity of construction; (2) "fair reading" and reasonableness of that reading; and (3) unanticipated costs . . . Along with the determination of the "legally" correct meaning of the plan provision in question, we also view as probative of the good faith of a trustee or administrator the following factors: (1) internal consistency of a plan under the interpretation given by the administrators or trustees; (2) any relevant regulations formulated by the appropriate administrative agencies . . .; and (3) factual background of the determination by a plan and inferences of lack of good

faith, if any. The fact that a trustee's interpretation is not the correct one as determined by a District Court does not establish in itself arbitrary and capricious action, but is a factor in that determination. *Dennard* at 314; see also *Denton*, 765 F.2d at 1304; *Ganze v. Dart Industries*, 741 F.2d 790 (5th Cir. 1984).

The parties hereto have focused on the definitions of "Compensated Employee" and "Compensation" as set out in the Plan (and quoted hereinabove). The Committee interpreted the Plan so as to exclude general agents from the definition of "Compensated Employees" and general agents' commissions from the definition of "Compensation" under the Plan. The evidence conclusively established that the Committee had uniformly construed the Plan to exclude general agents and general agents' commissions from coverage under the Plan. No individual acting in the capacity of a general agent has ever been an eligible participant in the Plan.

Further, a fair reading of the Plan reveals that the term "compensation" is initially defined as the "total currently taxable remuneration paid by the Employers and the Affiliates to a Compensated Employee for *services rendered*." (Emphasis added.) Under this definition, general agents' commissions would not be included in that such commissions were overwrite commissions paid to Lowry pursuant to the general agent contract and not pursuant to services rendered to the employer or the affiliates. Lowry relies on that portion of the definition that states:

[P]rovided, that subsequent to February 28, 1977, Compensation shall include remuneration paid pursuant to an insurance agent or agency contracts provided that the payee, at the time of payment, is employed on the home office payroll, or as a Field Manager, or as a field office clerical employee of the Company or Affiliate.

Lowry claims that he is eligible to receive retirement benefits based upon his general agent contract commissions because such overwrite commissions income qualifies as "remuneration" and is compensation under the Plan. He further contends that such overwrite commission was "remuneration" paid "pursuant to an insurance agent or

agency contract" and that he was on the "home office payroll" of the company or affiliate at the time of said payment.

Even though the parties seem to focus on the definition of "compensation," the Court finds that additional issues are the meaning of "remuneration" and "home office payroll." The Plan itself does not define "remuneration" which is susceptible to different meanings. In looking to the General Agent Contract as the source for commissions which Lowry claims are "remuneration" and thus "compensation" under the Plan, it appears that there may be a different focus on the two words. The General Agent Contract, under the heading "Compensation," states that:

The Company may pay commissions as set forth in the attached Schedules of Commission as compensation in full for the performance of services of the General Agent . . .

The Contract further provides, under the heading "Agents and Employees of General Agent," that:

The compensation of Agents shall be paid by the General Agent out of *commissions* and other *compensation* paid to the General Agent as set forth in this Contract or schedules and supplements thereto. The company at its discretion may pay the Agent any *commission or remuneration* which are then or may thereafter become . . . [emphasis added]

The Internal Revenue Code, 26 U.S.C. § 401(l)(2)(C), defines "remuneration" (in discussing a defined contribution plan) as:

- (i) total compensation or
- (ii) basic or regular rate of compensation,

whichever is used in determining contribution or benefits under the plan.

Under the Plan in question, no definition has been given. Further, *Black's Law Dictionary* defines "remuneration" as "reward; recompense; salary."

[2] The evidence presented by the Committee illustrated that the intent of the provision to provide benefits based

upon "remuneration paid pursuant to an insurance agent or agency contract" was aimed at field managers and other agents based upon *personal production*, not commissions earned because of the production of others. Lowry was consistently paid benefits for his personal production, as were other agents, all in keeping with the intent of the Plan. The Committee's interpretation simply restated the policy that the Committee claims to have been applying since the Plan's inception, and in and of itself was not not arbitrary and capricious.

The Committee relied upon the uniform practice of excluding general agents from participation in the Plan for purposes of calculating the pension's funds, costs of benefits and the contribution rates necessary to sustain its costs. In *Paris*, 637 F.2d at 362, the court stated that:

The trustees of [a] pension fund may properly enforce pension rules limited pension benefits if [the] alternative would require inappropriate or unanticipated costs to the fund or as to potentially limit resources available to the proper beneficiaries.

If general agents are allowed to participate in the Plan, such participation would cause the pension fund to sustain a substantial unanticipated cost.

The trustees of [a] pension fund may properly enforce pension plan rules limiting pension benefits if an alternative would require inappropriate or unanticipated costs to the fund so as to potentially limit resources available to the proper beneficiaries of the trust.

*Bayles*, 602 F.2d at 100.

Applying the arbitrary and capricious standard and the relevant factors outlined in *Dennard, supra*, the evidence conclusively established that the Committee has uniformly construed the Plan.

Further, a fair reading of the Plan reveals that its language is intended to cover only those participants who act in the capacity of a "home office employee (*i.e.*, being on the home office payroll)," "field manager," or "field office clerical employee of the Company or an Affiliate." Lowry bases

his claim as being on the "home office payroll." The definition of "home office payroll" is not contained in the Plan itself and must be determined since Lowry relies on this designation for his claims of benefit. Although the evidence indicates that Bankers is the "home office," and Union and Certified Life are affiliates, Lowry contends he was on the "home office payroll" of Bankers, Union, or Certified Life during the period from March 1, 1979, until the date of his retirement on February 28, 1986. In order to qualify for benefits under the disputed provision, Lowry must have been on the "home office payroll," but of which company. From March 1, 1979, to December 5, 1979, during the existence of the General Agent Contract, Lowry was on the payroll of Union, not Bankers, the seemingly "home office." The failure of the Plan to define "home office payroll" creates in and of itself an ambiguity thus allowing the Committee to interpret the Plan and the benefits to be derived.

[3] If both the Committee and Lowry offer rational but conflicting interpretations of the Plan's provisions, "the trustees' interpretation must be allowed to controll." *Miles v. New York State Teamsters Conference Pension & Retirement Fund Employee Pension Benefit Plan*, 698 F.2d 593, 601 (2nd Cir.), *cert. denied*, 464 U.S. 829, 104 S.Ct. 105, 78 L.Ed.2d 108 (1983).

[4] Lowry placed a great deal of emphasis on the Committee's reliance on Revenue Ruling 69-569 as part of the basis for denying benefits to Lowry, alleging that such reliance was improper. The Committee was advised by its counsel that Revenue Ruling 69-569 would prohibit payment of benefits to Lowry based upon overwrite commissions arising out of the General Agent Contract. Revenue Ruling 69-569 deals with eligibility of an attorney to participate in a plan as an employee of a corporation, while at the same time receiving self-employment income. The ruling indicates that a plan will not qualify under I.R.C. Section 401 (a) if it includes a participant who is not an employee, but that an employee who is also self employed, or wearing "two hats," would be allowed to participate but that:

[T]he . . . contribution's [sic] or benefits under the plan are to be based only on the amount that he receives as an employee of the corporation.

In reviewing the Committee's reliance on Revenue Ruling 69-569 and the advice of counsel, the Court's inquiry is "whether it was reasonable for the Committee to have relied on the opinion . . ." *Denton*, 765 F.2d 1295 (5th Cir.1985).

The Plan states that it is "contingent upon, and subject to, obtaining and retaining the necessary approval of the Commissioner of Internal Revenue . . ." The Court finds that the Committee's reliance on Revenue Ruling 69-569 and the advice of counsel in denying benefits based upon overwrite commissions was reasonable under the circumstances.

The Committee has the right to exercise discretion when determining who qualifies for benefits. "On 'question of eligibility' it is settled ERISA law that 'wide discretion' may be exercised." *Hancock v. Montgomery Ward Long Term Disability Trust*, 787 F.2d 1302, 1308 (9th Cir.1986).

### *Conclusion*

The Court cannot say that the Committee acted arbitrarily or capriciously or with bad faith in interpreting its Plan and denying benefits to Lowry based upon overwrite commissions earned pursuant to the General Agent Contract. Therefore, the Court finds that defendants are entitled to judgment.

### JUDGMENT

This action came for trial before the Court, Honorable Sam R. Cummings, United States District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

It is ORDERED and ADJUDGED that the plaintiff, Donald A. Lowry, take nothing from the defendants, Bankers Life and Casualty Retirement Plan, Bankers Life and Casualty Savings Investment Plan, Bankers Life and Casualty Company, and Robert P. Ewing, Chester M. Lozowski, Paul Janus, Barth Murphy, Paul Higdon, Jack Zimmer, Tom Dunphy, Jim Dentle, Jack Gardiner, and Robert Shaw, as Members of the Pension Plan Committee and/or Fiduciaries, and that this action be dismissed on the merits.

All costs are assessed against plaintiff.

**APPENDIX D**

**DONALD A. LOWRY, Plaintiff,**  
**v.**  
**BANKERS LIFE AND CASUALTY**  
**RETIREMENT PLAN, et al.,**  
**Defendants.**

**CA-3-87-0293-C**

United States District Court for the  
Northern District of Texas  
Dallas Division

Feb. 9, 1989.

**JUDGMENT**

This action came on for trial before the Court, Honorable Sam R. Cummings, United States District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

It is ORDERED and ADJUDGED that the plaintiff, Donald A. Lowry, take nothing from the defendants, Bankers Life and Casualty Retirement Plan, Bankers Life and Casualty Savings Investment Plan, Bankers Life and Casualty Company, Union Bankers Insurance Company, and Robert P. Ewing, Chester M. Lozowski, Paul Janus, Barth Murphy, Paul Higdon, Jack Zimmer, Tom Dunphy, Jim Dentle, Jack Gardiner, and Robert Shaw, as Members of the Pension Plan Committee and/or Fiduciaries, and that this action be dismissed on the merits.

All costs are assessed against plaintiff.

The Clerk shall furnish a copy hereof to each attorney of record.

Entered this 9th day of February, 1988.

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SAM R. CUMMINGS  
United States District Judge



## **BANKERS LIFE AND CASUALTY COMPANY RETIREMENT PLAN**

(Effective July 1, 1981)

### **Section 8. Administration**

8.1 *General Administration.* The Company shall be the "administrator" under ERISA responsible for reporting and disclosure concerning the Plan. The Plan shall be administered by the Company through a Committee of one or more persons appointed by the Company which shall have such powers and duties as may be delegated to it by the Company, including, but not limited to, authority:

(a) to determine all questions arising in such administration, including the power to determine the rights or eligibility of Employees and Participants and their beneficiaries, and the amounts of their respective interests; and its decision thereon shall be binding upon all persons;

(b) to adopt such rules and regulations of uniform application as it may deem necessary for the proper administration of the Plan and consistent with its purposes, including procedures for submission of claims and appeal of denied claims.

### **Section 11. Definitions**

Wherever used in this Plan, the following terms shall have the respective meanings set forth below, unless the context clearly indicates otherwise:

(g) *Committee.* The term "Committee" shall mean the Pension Plan Committee appointed by the Company under Section 8.1.

(h) *Compensated Employee.* The term "Compensated Employee" shall mean a person in the employ of an Employer or an Affiliate who receives Compensation. A person who acts solely in the capacity of an "Insurance Agent", or who is a trainee for that position, shall not be considered to be a Compensated Employee for the purposes of this Plan.

(i) *Compensation.* The term "Compensation" shall mean the total currently taxable remuneration paid by the

Employers and the Affiliates to a Compensated Employee for services rendered. Notwithstanding the foregoing, prior to March 1, 1977, Compensation shall not include any payments made pursuant to an insurance agent or agency contract between the Company or an Affiliate and a payee. Subsequent to February 28, 1977, Compensation shall include commissions and persistency bonuses paid pursuant to insurance agent or agency contracts provided that the payee, at the time of payment, is employed on the home office payroll, or as a Field Manager, or on the field office clerical payroll of the Company or an Affiliate.

**SIXTH  
AMENDMENT  
to  
BANKERS LIFE AND CASUALTY COMPANY  
RETIREMENT PLAN**

Bankers Life and Casualty Company, an Illinois corporation, hereby amends the Bankers Life and Casualty Company Retirement Plan, pursuant to §10.2 thereof, in the following respects effective October 1, 1982.

2. The second and third sentences of §11 (i) are amended to read as follows:

“Notwithstanding the foregoing, Compensation shall not include any payments made pursuant to an insurance agent or agency contract between the Company or an Affiliate and a payee; *provided*, that subsequent to February 28, 1977, Compensation shall include remuneration paid pursuant to insurance agent or agency contracts provided that the payee, at the time of payment, is employed on the home office payroll, or as a Field Manager, or as a field office clerical employee of the Company or an Affiliate.”

**APPENDIX F**  
**BANKERS LIFE AND CASUALTY COMPANY**  
**SAVINGS INVESTMENT PLAN**

(Effective July 1, 1981)

**Section 3 — Definitions**

Wherever used herein, unless the context clearly indicates otherwise, the following words shall have the following meanings.

3.04. *Committee* means the Pension Plan Committee which is responsible for administration of the Plan under Section 1.

3.05. *Company* means Bankers Life and Casualty Company, an Illinois corporation.

3.06. *Compensation* means all currently taxable compensation for services rendered received from the Employers, but shall not include any awards or prizes, or reimbursement or direct payment of expenses, insurance premiums, or severance pay in cash or property.

**Section 10 — Powers and Duties of the Committee**

10.01. *Appointment of Committee.* The Plan shall be administered by a Pension Plan Committee consisting of at least three persons who shall be appointed by and serve at the pleasure of the Board of Directors of the Company; *provided*, that during any vacancy, the remaining Committee members or member shall have and may exercise all powers of the Committee. All usual and reasonable expenses of the Committee may be paid in whole or in part by the Company, and any expenses not paid by the Company shall be paid by the Trustee. Members of the Committee shall not receive compensation from the Plan with respect to their services for the Committee.

10.02. *Administration of the Plan.* The Committee shall be charged with the general administration of the Plan. The Committee shall have all powers necessary to discharge the duties conferred upon it by the Plan including, but not by

way of limitation, the powers to establish rules not inconsistent with the Plan for the purpose of administering it; to interpret and construe the Plan; to determine all questions of eligibility and status under the Plan; and to delegate to any investment manager such discretionary or ministerial powers and authority with respect to the investment and reinvestment of the Fund as may be deemed to be appropriate. Except as provided in Section 10.04, the decisions of the Committee shall be final and binding on all persons interested in the Plan.

**EXHIBIT G**

**UNION BANKERS INSURANCE COMPANY**  
**2551 Elm Street • Post Office Box 225433**  
**DALLAS, TEXAS**

**GENERAL AGENT'S CONTRACT****1. Parties**

The parties to this contract are Union Bankers Insurance Company of Dallas, Texas, hereinafter referred to as the Company and *Don Lowry of Dallas, Texas* hereinafter referred to as the General Agent.

**2. Effective Date**

This contract shall take effect on *March 1, 1979*.

**3. Appointment**

The General Agent is hereby appointed and shall act for the Company as an independent contractor for the purpose of organizing and maintaining a sales organization for soliciting and procuring applications for policies of Life, Health, Accident, Hospitalization and Medical Insurance sold by the Company. This appointment shall continue until concluded as provided in Paragraph 16 hereof.

**4. Territory**

The activities of the General Agent under this contract shall be limited to the following territory:

This contract does not confer on the General Agent exclusive representation of the Company in that territory and the Company may appoint other General Agents or Agents in the same territory.

**5. Compensation**

The Company will pay commissions as set forth in the attached Schedules of Commissions as compensation in full for the performance of services of the General Agent. The attached Schedule of Commissions, including every provision set forth therein, is incorporated in and made a part of this contract. The commissions set forth on said Schedule may be altered, decreased, modified or withdrawn at the will

of the Company effective upon any business written subsequent thereto.

## **6. Authority**

During the continuance of this agreement, the General Agent has the authority to:

A. Procure applications for insurance issued by the Company and payments thereon and to issue receipts for the monies so collected;

B. Deliver policies issued on applications so procured, provided the first premium has been paid;

C. Give service to policyholders of policies so written so as to maintain the policies in force;

D. Endeavor to procure applications for reinstatement of lapsed policies; and

E. Recruit, train and appoint Agents, Brokers and Solicitors (all hereinafter referred to as Agents) to carry out the purposes of this contract.

## **7. Limitations of Authority**

The authority given in this contract to the General Agent is subject to the provisions and limitations contained in this contract and also to the provisions and limitations contained in the Company's manuals, rate books, rules and regulations. The Company may from time to time prescribe rules concerning the conduct of the business covered herein and may amend its manuals, rate books, rules and regulations, and the General Agent shall be governed thereby. This contract does not give the General Agent any authority to represent the Company except as specifically set forth in this contract, nor, by way of particular and not in limitation of the foregoing, any authority to alter, modify, waive or change the insurance contracts written by the Company, nor to commit the Company in any respect as regards liability or payment of claims. The authority herein granted shall end upon termination of this contract.

## **8. Agents and Employees of General Agents**

A. The General Agent, subject to the approval of the Company in each case, is authorized to appoint and contract with Agents to carry out the purposes of this Contract. He

shall, in contracting with Agents, use without alteration the Company's printed form of Agent's Contract, which shall be signed in triplicate by the Agent with all copies forwarded to the Company to be executed.

B. The General Agent shall be responsible for the acts of his employees and Agents and the General Agent agrees to hold the Company harmless from any claim arising out of any acts or omissions of his employees or his Agents, or from any unauthorized expense incurred by said Agents or employees.

C. The Company shall have the right to cancel the license of any Agent appointed hereunder when the Company determines that such Agent's operations are detrimental to the best interest of the Company or of the public.

D. The Compensation of Agents shall be paid by the General Agent out of commissions and other compensation paid to the General Agent as set forth in this contract or schedules and supplements hereto. The Company at its discretion may pay the Agent any commissions or remunerations which are then or may thereafter become due to said Agent under the terms of the Agent's contract with the Company and the Company may deduct said payments from any amount due from the Company to the General Agent. Payments made directly by the Company to Agents shall be a first lien on all amounts due the General Agent hereunder.

#### **9. Submittal of Applications — Collection of Premiums**

A. All applications for insurance obtained by the General Agent or his agents are to be delivered to the Company not later than one week from the time such applications are secured and shall be accompanied by the remittance of gross premium due the Company less commissions due his Agents for initial premiums collected.

B. The General Agent may collect money for or on behalf of the Company whenever an initial or reinstatement premium is paid on insurance procured by the General Agent. The Company may at its discretion permit the General Agent to collect renewal premiums as and when they mature. All premium collections shall be only in exchange for the regular receipt of the Company placed in the hands of the General Agent for the purpose of effecting such col-

lections. All monies received or collected by the General Agent for or on behalf of the Company shall be held in a fiduciary capacity and shall not be comingled with other funds or used for any other purpose but shall be immediately paid over to the Company.

C. All policies sent to the General Agent shall be delivered promptly to the applicant and whenever such delivery cannot be made, the General Agent agrees to return each such policy to the Company within 30 days of date of policy issue.

### **10. Refund of Premiums**

Whenever a premium has been refunded to an applicant or policyholder in accordance with the rules and regulations of the Company, the General Agent agrees to immediately return to the Company any commissions received as a result of that business.

### **11. Promotion of Interest and Primary Line**

The General Agent shall promote the interest of the Company as contemplated by this contract and shall conduct himself so as not to adversely affect the business, good will, or reputation of the Company, nor shall he assist any competitive insurer by referral of Agents, leads or otherwise to the detriment of the Company.

### **12. Independent Contractor**

Nothing contained in this contract is intended to create between the parties the relationship of employer and employee nor said relationship between the General Agent and his Agents, nor between the Company and the Agents.

### **13. Reports, Records, Licenses and Taxes**

The General Agent shall maintain accurate records as to the business transacted by him and his Agents. The Company may stipulate the form in which such records shall be kept. Such records shall be open to inspection by a representative of the Company. The General Agent is to furnish information supplementary to such records which is necessary or appropriate to inform the Company as to the status of the business with which this contract is concerned. (The General Agent shall make and file all reports and returns required of him by any municipal, state or federal statute

or regulation and shall pay all taxes levied against him by same. This shall not be construed as requiring the General Agent to pay state premium taxes or any other taxes levied against the Company.)

The General Agent or the Agent as the case may be shall pay for the renewal state license fees. Any occupational license fee required of the General Agent or Agent under local ordinances shall be paid by the General Agent or Agent as the case may be. The General Agent is to secure and maintain for himself the other municipal and state license necessary for him to conduct business and he shall not, nor shall he permit his Agent to write insurance unless properly licensed.

#### **14. Advertising**

No promotional material, advertising circulars, radio or TV broadcasts, or other advertising matters shall be made, published or circulated by the General Agent until written approval of the Company shall have been obtained.

#### **15. Books, Supplies and Data**

The Company will supply suitable rate information, sales manuals and forms for the solicitation of applications for insurance. Upon termination of this contract, all rate books, manuals, records, policyholder cards, supplies, sample policies and other materials so furnished to the General Agent shall concurrently be surrendered and delivered to the Company. The General Agent agrees to hold all leads, names, policyholder cards or other contact data furnished him by the Company in a fiduciary capacity, and he agrees not to divulge such leads, names, policyholder cards or other contact data to any other Company or Agency and to return the same to the Company upon demand therefor.

#### **16. Termination of Contract**

Upon termination of his contract for any reason, all liability of the General Agent to the Company shall immediately become due and payable.

A. Either party may terminate this contract at will by giving 30 days notice to the other of his intention to terminate the contract.

B. The Company may terminate this contract immediately for cause. For cause means any violation by the General Agent of the terms of this contract and includes, but is not limited to fraud, failure to remit funds, or failure to secure and maintain necessary licenses.

C. If this contract is terminated for cause as herein defined, no commissions or other compensation or allowances shall be payable.

### **17. Indebtedness**

The Company may deduct any indebtedness due or to become due at any time from the General Agent to the Company from any commissions or other payments due the General Agent hereunder without limitation of the Company's other legal or equitable remedies as regards indebtedness. Said indebtedness shall be a first lien on all payments due or to become due the General Agent hereunder.

### **18. No Waiver**

No act of forbearance or toleration on the part of the Company shall be construed as a waiver by the Company of any of its rights hereunder.

### **19. Non-Assignability**

This contract is not transferable. Any assignment, transfer or sale of this contract or of any right or interest herein, whether due or to become due, without the prior written consent of the Company shall not be valid or in any way binding.

### **20. Surety Bond**

The General Agent agrees at his expense, if so requested, to furnish a bond in an amount and with surety satisfaction to the Company for the faithful discharge of and performance of all the duties and obligations of this contract.

### **21. Captions**

The captions and sub-captions contained in this contract are for the purpose of convenience and shall not be construed as limiting or expanding the text.

**22. Right to Reject Applications  
and Remove Policies from Sale**

The Company reserves the right to reject any application for insurance submitted hereunder without specifying the reason therefor. It reserves the right to remove from sale any policy of insurance from the territory or parts thereof assigned to the General Agent and it may increase or decrease the premiums charged for any policy issued by it.

**23. Entire Contract**

This contract and the commission schedules referred to herein supersede all previous contracts between the parties, if any, and constitute the entire contract between the parties. The contract can be changed or modified in behalf of the Company only by the written consent of the President or a Vice President of the Company.

IN WITNESS WHEREOF, the parties have executed this contract at Dallas, Texas, this *1st* day of *March*, 1979.

UNION BANKERS INSURANCE COMPANY

BY \_\_\_\_\_  
Vice President

\_\_\_\_\_  
GENERAL AGENT

**AMENDMENT TO GENERAL AGENT'S  
SCHEDULE OF COMMISSIONS****SCHEDULE A — A & H COMMISSIONS**

THE COMMISSIONS PAYABLE IN CONNECTION  
WITH THE V.I.P. ARE AS FOLLOWS:

Commissions 1st Yr.	Renewal Commissions 2nd Yr.	Renewal Commissions 3rd-10th Yr.	Service Fees 11th & After
50%	20%	10%	2%

Attach to General Agent's Contract and Schedule of Com-  
missions as it becomes a part thereof.

May 15, 1979

**VESTING AMENDMENT:**

The General Agent's Contract between Union Bankers Insurance Company and the person described below is amended to provide immediate vesting on all applicable Accident and Health, Life and Annuity premium income produced.

IN WITNESS WHEREOF, the parties have executed this agreement at Dallas, Texas, this *1st* day of *March*, 1979.

---

APPROVED:

UNION BANKERS INSURANCE COMPANY

By \_\_\_\_\_  
Agency Officer

By \_\_\_\_\_

10g

TO: Pat Scribner

Field Office Number \_\_\_\_\_

HOME OFFICE DEPARTMENT	INDIVIDUAL

Re: 690/691 commissions for Don Lowry

MEMO:

3% Agent  
1/2% D.M.  
1/2% Ch. Sulak  
1/2% Lowry

FROM	Leo Arsen	6-20-79
	H.O. Department	Individual Date

394-E

300073-A

## GENERAL AGENT'S SCHEDULE OF COMMISSIONS

Subject to paragraphs 1 through 23 of the General Agent's Contracts to which this Schedule is attached, the Company will allow and the General Agent will accept as full and complete compensation (less application fee where applicable) commissions for Accident, Health and Life sales in accordance with the following Schedules and these Schedules include commissions payable to all agents assigned to General Agent's Office.

### SCHEDULE A — A & H COMMISSIONS

PREMIUM MODE	COMMISSIONS INITIAL	COMMISSIONS 2nd and 3rd months	COMMISSIONS Balance of 1st year	REN. COMM. 2nd thru 10th policy years
Monthly (PPSP Only)	130%	75%	40%	20%
Quarterly	100%	NONE	40%	20%
Semi/annually	75%	NONE	40%	20%
Annually	60%	NONE	NONE	20%

All rider forms pertaining to the policy forms outlined in Schedule A will carry the same rate of commissions as the policy form to which it is attached. No applications may be submitted on a direct pay monthly mode.

1. The General Agent is permitted to retain the prescribed policy fees as submitted by Agents under his/her supervision, and on the General Agent's personal production.

2. The Company reserves the right to modify or withdraw at any time the terms of the above schedule. Any business produced after the effective date of such modifications or change shall be affected.

3. This Schedule of Commissions has been attached to and made a part of the General Agent's Contract with Union Bankers Insurance Company of Dallas, Texas.

### SCHEDULE B — LIFE COMMISSIONS LIFE POLICIES

Form No.	Policy Description	Age at Issue	Minimum Issue Size	Comm. First Year	Comm. 2nd Year	Ren. Comm. 3-10 Yr. (or Prem. Pay Per. If Le)	Service Fees* 11-20th Yr.
BL-52B	Decreasing Term Policy						
	10 Year Term Period	18-60	15,000	97%	19%	11%	2%
	15 Year Term Period	18-60	15,000	97%	19%	11%	2%
	20 Year Term Period	18-55	15,000	97%	19%	11%	2%
	25 Year Term Period	18-50	15,000	97%	19%	11%	2%
	30 Year Term Period	18-40	15,000	97%	19%	11%	2%
BL-52N	Annually Renewable Term	18-65	50,000	77%	16%	8%	2%
BL-53A	Joint Decreasing Term						
	10 Year Term Period	19-60	15,000	97%	19%	11%	2%
	15 Year Term Period	18-60	15,000	97%	19%	11%	2%
	20 Year Term Period	18-55	15,000	97%	19%	11%	2%

Form No.	Policy Description	Age at Issue	Minimum Issue Size	Comm.		Ren. Comm. 3-10 Yr. 11-20th Yr. (or Prem. Pay Per. If Le)	Service Fees*
				First Year	2nd Year		
FA-79 SA-79 UBL-79 UBL-120 UBL-122 UBL-125	25 Year Term Period	18-50	15,000	97%	19%	11%	2%
	30 Year Term Period	18-45	15,000	97%	19%	11%	2%
	Flexible Annuity	0-75	5,000	9¼%	4¼%	1½%	¾%
	Single Prem. Ann.	0-75	5,000	5¾%			
	Joint Whole Life	15-65	5,000	122%	19%	11%	2%
	20 Payment Life	0-65	2,000**	82%	19%	11%	2%
	President's Plan	0-70	5,000	122%	19%	11%	2%
	Bonus 25	0-20	15,000	77%	9%	6%	2%
	When Converted	25	20,000	37%	9%	6%	2%
	20 Payment Life — Par	0-39	1,000	82%	19%	11%	2%
UBL-129		40-50	1,000	82%	19%	11%	2%
		51-55	1,000	82%	19%	11%	2%
		56-64	1,000	82%	19%	11%	2%
		65-70	500	82%	19%	11%	2%
		71-75	500	82%	19%	11%	2%
		76-80	500	82%	19%	11%	2%
		0-40	2,000	92%	19%	11%	2%
		41-45	2,000	92%	19%	11%	2%
		46-50	2,000	92%	19%	11%	2%
		51-55	2,000	92%	19%	11%	2%
UBL-165	Life Paid Up At Age 65						

Form No.	Policy Description	Age at Issue	Minimum Issue Size	Comm. First Year	Comm. 2nd Year	Ren. Comm. 3-10 Yr. 11-20th Yr. (or Prem. Pay Per. If Le)	Service Fees*
UBL-170	Life Modified At Attained Age 70	1-55M	5,000	92%	19%	11%	2%
		1-58F	5,000	92%	19%	11%	2%
UBL-195	Life Paid Up At Age 95	1-25	20,000	92%	19%	11%	2%
		26-70	20,000	92%	19%	11%	2%
UBL-220	Ord. Life/20 Yr.	15-55	5,000	97%	19%	11%	2%
UBL-230	Dec. Death Benefit Ord. Life/30 Yr.	15-45	5,000	97%	19%	11%	2%
		0-65	2,000**	67%	19%	11%	2%
UBL-320	Dec. Death Benefit 20 Year Endowment	0-30	2,000	82%	19%	11%	2%
UBL-365	Endowment At Age 65	31-35	2,000	82%	19%	11%	2%
		36-40	2,000	82%	19%	11%	2%
		41-45	2,000	82%	19%	11%	2%
		46-50	2,000	82%	19%	11%	2%
		51-55	2,000	82%	19%	11%	2%
UBL-395	Family Insurance (\$5,000 Base)	Note (1)	1 Unit	82%	19%	11%	2%
UBL-418	Endowment at Age 18	0-3	1,000	72%	19%	11%	2%
		4-9	1,000	72%	19%	11%	2%

Form No.	Policy Description	Age at Issue	Minimum Issue Size	Comm. First Year	Comm. 2nd Year	Ren. Comm. 3-10 Yr. 11-20th Yr. (or Prem. Pay Per. If Le)	Service Fees*
UBL-505	5 Year Lev. Term Ren. & Conv.	15-60	5,000	92%	19%	11%	2%
UBL-507	F&A Term — 5 Yr. Lev.						
UBL-511	Term Ren. & Conv.	0-65	40A.P.	50%	Note(2)		
	Executive Decreasing Term						
	10 Years	15-60	15,000	97%	19%	11%	2%
	15 Years	15-60	15,000	97%	19%	11%	2%
	20 Years	15-55	15,000	97%	19%	11%	2%
	25 Years	15-50	15,000	97%	19%	11%	2%
UBL-545	Mother and Child	Note (3)	1 Unit	92%	16%	9%	2%
UBL-551	Life Style Protector	Note (4)	100,000	92%	16%	9%	2%
UBL-565	Level Term to Age 65	15-49	5,000	82%	19%	11%	2%
UBL-569	Decreasing Term To Age 70	15-55	1 Unit	97%	19%	11%	2%
		56-60	1 Unit	97%	19%	11%	2%
UBL-598	Convertible Term (Non-Ren.)						
	5 Year Term Period	15-60	20,000	72%	19%	11%	2%
	10 Year Term Period	15-55	5,000	72%	19%	11%	2%
	15 Year Term Period	15-50	5,000	72%	19%	11%	2%
UBL-623	Juvenile Estate Builder	0-4	1,000	37%	19%	16%	2%
		5-14	1,000	37%	19%	16%	2%

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## LIFE RIDERS

Commissions and service fees on additional premiums for all Life Insurance Policy Riders, unless otherwise noted, will be paid at the same rate as the Base Policy to which the rider is assigned.

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- \* Service fees are non-vested and are only payable to active General Agents.
  - \*\* For issue ages 0-14 minimum issue size is \$1,000
  - \*\*\* On UBL-195 Policies issued on the life of the General Agent, any of his/her writing agents, or members of his/her or their immediate families, First Year General Agents commissions will be reduced by 5%.
  - \*\*\*\* Renewal Commissions payable on base policy only, excluding premium for Annuity Rider and Dividends.
- Note (1) Applicable issue ages are as follows:  
Applicant (husband) 18-45 provided the husband is between 7 years younger and 12 years older than wife.  
Insured wife 17-52 provided the husband is between 7 years younger and 12 years older than wife.  
Insured children 15 days — actual age 18.
- Note (2) Ren. Comm. for the second pol. year is: 25%; 3rd through 5th yr: 10%; 6th through 10th yr: 7½%.
- Note (3) Insured 15-45, Children 15 days to 18th birthday.
- Note (4) Neither Insured can be under age 18 or over age 50. The average issue age of the two Applicants must be between 19-45.
- Note (5) If policy is continued in force beyond attained age 23 by subsequent payment of required premiums, and the agent is active, it will be considered as new business, and commissions and service fees will be those applicable to the 165.
- Note (6) Commissions Same As Base Policy To Which Rider Has Been Added.
- Note (7) Single premium Must be Sufficient to Provide a Minimum Monthly Income of \$20.00.
- Note: On Military Risks in the first 3 pay grades, reduce commission by 25% of that shown.

1h

U.S. District Court  
Northern District of Texas  
FILED  
Jan. 20, 1988  
Nancy Hall Doherty, Clerk

By .....  
-Deputy

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION**

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**CIVIL ACTION**

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**NO. CA-3-87-0293-C**

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**DONALD A. LOWRY**

**v.**

**BANKERS LIFE AND CASUALTY RETIREMENT PLAN, BANKERS  
LIFE AND CASUALTY SAVINGS INVESTMENT PLAN, BANKERS  
LIFE AND CASUALTY COMPANY, UNION BANKERS INSURANCE  
COMPANY, and ROBERT P. EWING, CHESTER M. LOZOWSKI,  
PAUL JANUS, BARTH MURPHY, PAUL HIGDON, JACK ZIMMER,  
TOM DUNPHY, JIM DENTLE, JACK GARDINER and ROBERT  
SHAW, AS MEMBERS OF THE PENSION PLAN COMMITTEE and/  
or FIDUCIARIES**

**PRETRIAL ORDER**

This matter having come before the Court pursuant to Rule 16 of the Federal Rules of Civil Procedure and Local Rule of Practice 7.1 for the United States District Court for the Northern District of Texas. Carl David Adams of Adams & Francis, Dallas, Texas, appearing as counsel for Plaintiff and Stuart M. Reynolds, Jr. of Moore & Peterson, Dallas, Texas, appearing as counsel for Defendants, the following action was taken.

## 1. NATURE OF ACTION AND JURISDICTION

This is a claim by Plaintiff for retirement benefits under the Employee-Retirement Income Security Act (ERISA) 29 U.S.C. § 1001 et seq.

The following statements and stipulations were submitted, attached to and made a part of this Order.

## 2. SUMMARY OF CLAIMS AND DEFENSES OF EACH PARTY

*A. Plaintiff's claims as stated by Plaintiff:* Plaintiff was employed by Union Bankers Insurance Company (Union) and/or Bankers Life (Bankers) from March 1, 1979 until March 1, 1986 and held a General Agent's contract with Union from March 1, 1979 until December 15, 1979. Plaintiff claims that, as per his agreement with Union's President, John H. Coffman, in January 1979 when he agreed to become a General Agent, he was to be considered, and claims he was at all times treated, as an employee on the home office payroll of Union or Bankers Life (both are covered by the Plans) from March 1, 1979 until his termination by retirement on March 1, 1986. Plaintiff was employed with Union Bankers or an affiliate company of Bankers Life in some capacity from October 1, 1950 to March 1, 1986.

Plaintiff claims that because of his status on the home office payroll of Union and/or Bankers from 1979-1986, *all compensation* from Union (both salary *and* remuneration paid him pursuant to his General Agent's contract, i.e. overwrite commissions) was within the clear definitions of "Total Compensation," and "Compensation" found in the Retirement Plan and Savings Plan of Bankers Life (which Union was an affiliate and member).

Plaintiff claims the applicable definitions and terms of the Plan which lawfully must control Plaintiff's claim for benefits *are* clear and *are not ambiguous* and that the refusal of the Plan administrators and it's Committee to pay retirement benefits to Plaintiff based upon the overwrite commissions paid to Plaintiff from 1979-1986 while he was on the home office payroll of Union or Bankers was, in light of the express terms of the Plan, arbitrary, capricious and in bad faith.

Plaintiff also claims that to the extent his ERISA benefits were denied by Bankers, the Committee and Union, such constitutes a breach of fiduciary duties. Plaintiff also claims that to the extent Union and/or Bankers failed to correctly report all his qualifying compensation to the Plan(s) and make contributions to the Plan(s) sufficient to fund benefits based upon his total compensation (including overwrite commissions) such constitutes a breach of fiduciary duty by Union and/or Bankers and a breach of its expressed contract/agreement with Plaintiff that his status on the home office payroll would entitle him to retirement benefits on all compensation paid him.

Plaintiff also seeks attorney's fees at trial and on appeal.

B. *Defendants' Defenses as stated by Defendants:* Plaintiff has been paid the full amount of retirement benefits to which he was entitled under the retirement plans in effect during his employment. Plaintiff is not entitled to additional retirement benefits based on overwrite commissions paid to him as a General Agent and independent contractor pursuant to a written General Agent's contract dated March 1, 1979 and terminated December 15, 1979. The Plan administrators' denial of Plaintiff's claim for such additional retirement benefits was based on a fair reading of the plan documents, is consistent with the administration of the plan with respect to all employees and agents, and cannot be set aside unless such denial of additional benefits was arbitrary or capricious. Defendants contend that the release signed by Plaintiff, effective upon termination of his General Agent's contract on December 15, 1979, constitutes accord and satisfaction or release of any claims Plaintiff may have for additional retirement benefits based on commissions paid to him pursuant to such General Agent's contract. Defendants also contend that Plaintiff's acceptance of a lump sum distribution of retirement benefits, with full knowledge that the disputed sums had not been included in calculating such benefits, constitutes accord and satisfaction or release. Furthermore, Defendants contend that the inclusion of Plaintiff's independent contractor earnings as a basis for computing Plaintiff's retirement benefits would be outside the scope of the Plans as qualified by the United States Internal Revenue Service. Defendants deny the existence of

fiduciary duties as alleged by Plaintiff and, to the extent fiduciary duties are imposed upon some or all Defendants with respect to retirement plans covered by E.R.I.S.A., deny breach of any such duties. Defendants deny the existence of any contract or agreement to pay retirement benefits based on the General Agent's commissions paid to Plaintiff. In the alternative, — Defendants deny breach of any contract alleged by Plaintiff and affirmatively assert that Defendants fully complied with their obligations pursuant to any such contract.

### 3. STATEMENT OF STIPULATED FACTS

The following factual matters are not disputed:

A. That from March 1, 1979 to December 15, 1979 Plaintiff held a General Agent's contract with Union and was at all relevant times carried on the home office payroll of Union or Bankers Life.

B. That Plaintiff has been paid retirement benefits from the Plan(s) for all compensation paid Plaintiff as regular salary and commissions other than the overwrite commissions paid Plaintiff pursuant to the March 1, 1979 General Agent's contract.

C. That all of the disputed monies paid Plaintiff (the overwrite commissions) upon which he bases his claims were paid to Plaintiff under the March 1, 1979 General Agent's contract and were in the form of overwrite commissions reflected on Internal Revenue Service 1099 forms.

D. That the amount of commissions paid Plaintiff in 1979 and thereafter pursuant to the March 1, 1979 General Agent's contract are \$585,025.52 and the additional amount of benefits due *if* such are found by the Court to be payable to Plaintiff under the Plan(s) are \$384,533.96.

E. That the issue of each parties' attorney's fees will be tried to the Court post-trial in the form of affidavits from the attorneys and that no testimony regarding same need be presented during trial.

F. That the Bankers Life and Casualty Retirement Plan and the Bankers Life and Casualty Savings Investment Plan are qualified "ERISA" plans as defined by 29 U.S.C. §1001 et. seq.

G. That Plaintiff exhausted his remedies under the plans prior to instituting this action.

H. That documents previously produced in discovery will not be objected to by the receiving party as to authenticity or as to whether they qualify as business records of the producing party.

#### 4. LIST OF CONTESTED ISSUES OF FACT

The factual issues which are disputed are:

A. Was the Defendants' denial of Plaintiff's claim for retirement benefits based upon the commissions paid him by Union in the form of 1099 overwrite commissions, arbitrary or capricious?

B. Do the Plan(s) in question allow a fair reading that would *exclude* commissions of the type paid Plaintiff by Union from the definition of "compensation" under the Plan for retirement benefit purposes?

C. Does the conduct of Defendants in denying Plaintiff benefits based on overwrite commissions paid to Plaintiff so violate the Plan as to constitute a breach of fiduciary duty?

D. Apart from construction of the Plan(s), was there a contract or agreement with Plaintiff with regard to the treatment to be given his General Agent commissions for retirement purposes?

E. Does the conduct of Defendant, Union, constitute a breach of contract with Plaintiff regarding the agreement(s) made, if any, with regard to the treatment to be given his General Agent commissions for retirement purposes?

## 5. LIST OF CONTESTED ISSUES OF LAW

The contested issues of law are:

A. What is the correct interpretation of the Plan(s) in question with regard to whether commissions paid Plaintiff by Defendant Union qualify as "compensation" for retirement purposes?

B. Was the interpretation of the Plan employed by Defendants to deny Plaintiff's claim for benefits so contrary to a fair reading of the Plan as to constitute arbitrary and capricious action on their part?

C. Was the conduct of Defendants a breach of fiduciary duty or a breach of contract?

D. Would the inclusion of Plaintiff's independent contractor earnings violate the Plan(s) as qualified by the Internal Revenue Service?

E. Are Plaintiff's claims barred by accord and satisfaction or release because of the Mutual Release executed December 4, 1979, effective December 15, 1979?

F. Are Plaintiff's claims barred by accord and satisfaction or release because he accepted a lump sum distribution in 1986 with full knowledge that his General Agent commissions had not been included?

## 6. ESTIMATE OF LENGTH OF TRIAL

The parties estimate the trial will not take more than one and one-half (1½) days. The case is set for the four (4) week docket beginning February 1, 1988. Plaintiff's counsel has advised Defendant's counsel of his unavailability for the week of February 8, 1988 and both sides have agreed to request the case be tried the weeks of February 1, February 15 or February 22, 1988.

IT IS ORDERED, that this Pretrial Order is to amend previous pleadings and may be modified at the time of trial or prior thereto to prevent manifest injustice. Such modification can be made either on application of counsel or on motion of the Court.

Dated this 19th day of January, 1988.

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UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND SUBSTANCE:

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CARL DAVID ADAMS  
Attorney for Plaintiff

---

STUART M. REYNOLDS, JR.  
Attorney for Defendants

No. 89-137

Supreme Court, U.S.

FILED

AUG 18 1989

JOSEPH F. SPANIOLO, JR.  
CLERK

In The  
Supreme Court of the United States

October Term, 1989

DONALD A. LOWRY,

*Petitioner,*

v.

BANKERS LIFE AND CASUALTY  
RETIREMENT PLAN, et al.,

*Respondents.*

On Petition For Writ Of Certiorari  
To The United States Court  
Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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*Attorneys for Respondents*



## QUESTIONS RESTATED

1. Whether the holding of the Court of Appeals for the Fifth Circuit, applying an abuse of discretion standard rather than a *de novo* standard in reviewing a denial of benefits by a Plan Administrator given discretionary responsibility under the Plan to determine eligibility for benefits and to construe the Plan, is in conflict with this Court's holding in *Bruch* and the holding of the Court of Appeals for the Fourth Circuit in *Boyd*.
2. Whether the holding of the Court of Appeals for the Fifth Circuit, declining to consider an allegation of Plan Administrator conflict of interest, raised for the first time on petition for rehearing in the Court of Appeals, is in conflict with this Court's holding in *Bruch*.
3. Whether the holding of the Court of Appeals for the Fifth Circuit, affirming a finding that the Plan grants the requisite discretionary authority to the Plan Administrator, is in conflict with this Court's holding in *Bruch*.

## LIST OF PARTIES

The parties to the proceedings below were the Petitioner Donald A. Lowry and the Respondents Bankers Life and Casualty Retirement Plan, Savings Investment Plan, Bankers Life and Casualty Company, Union Bankers Insurance Company, Robert P. Ewing, Chester M. Lozowski, Paul Janus, Barth Murphy, Paul Higdon, Jack Zimmer, Tom Dunphy, Jim Bentle, Jack Gardiner and Robert Shaw.

Union Bankers Insurance Company is a Texas company, wholly owned by Bankers Life and Casualty Company, an Illinois company, both part of the I.C.H. Companies insurance company system, owned by I.C.H. Corporation, a Delaware corporation (I.C.H. is not a party to this case).

## TABLE OF CONTENTS

	Page
QUESTIONS RESTATED .....	i
LIST OF PARTIES .....	ii
TABLE OF CONTENTS .....	iii
TABLE OF AUTHORITIES .....	v
OPINIONS BELOW .....	2
STATEMENT OF THE CASE .....	2
REASONS FOR DENYING THE WRIT .....	5
I. NO CONFLICT OF AUTHORITY EXISTS TO WARRANT REVIEW BY THIS COURT BECAUSE THE FIFTH CIRCUIT COURT OF APPEALS APPLIED THE CORRECT STAN- DARD TO REVIEW THE ADMINISTRATOR'S DECISION AND THE ADMINISTRATOR COM- MITTED NO ERROR OF LAW IN INTERPRET- ING THE PLAN .....	5
A. THE STANDARD OF REVIEW APPLIED IN LOWRY II PRESENTS NO CONFLICT OF AUTHORITY .....	6
B. THE COURTS BELOW HAVE REVIEWED THE ALLEGATIONS OF AN ERROR OF LAW BY THE ADMINISTRATOR IN INTERPRETING THE PLAN AND HAVE FOUND NO ERROR .....	10
C. LOWRY II IS CONSISTENT WITH THE POST-BRUCH DECISIONS BY OTHER APPELLATE AND DISTRICT COURTS ....	14

## TABLE OF CONTENTS – Continued

	Page
II. PETITIONER'S CONFLICT OF INTEREST ALLEGATION WAS PROPERLY REJECTED BY THE COURT OF APPEALS AND RAISES NO ISSUE UNDER <i>BRUCH</i> .....	17
III. THE COURT OF APPEALS CORRECTLY HELD THE PLAN GIVES THE ADMINISTRATOR DIS- CRETIONARY AUTHORITY TO DETERMINE ELIGIBILITY FOR BENEFITS AND TO CON- STRUE THE TERMS OF THE PLAN .....	20
CONCLUSION .....	22
APPENDIX A – Excerpts from February 1, 1988 trial testimony of Donald A. Low- ry.....	A-1
APPENDIX B – Synopsis of Post- <i>Bruch</i> decisions by Courts of Appeals and District Courts.....	B-1

## TABLE OF AUTHORITIES

	Page
CASES	
<i>Adams v. Avondale Indus., Inc.</i> , 712 F.Supp. 1291 (S.D. Ohio 1989).....	B-7
<i>Bali v. Blue Cross &amp; Blue Shield Ass'n</i> , 873 F.2d 1043 (7th Cir. 1989).....	17, B-4
<i>Batchelor v. International Bhd. of Elec. Workers Local 861 Pension &amp; Retirement Fund</i> , 877 F.2d 441 (5th Cir. 1989) .....	B-1
<i>Bilka v. Blue Bell, Inc.</i> , 712 F.Supp. 509 (M.D.N.C. 1989).....	B-7
<i>Boyd v. The Trustees of the United Mine Workers Health &amp; Retirement Funds</i> , 873 F.2d 57 (4th Cir. 1989) .....	9, 10, 21, 22, B-4
<i>Brown v. Ampco-Pittsburgh Corp.</i> , 876 F.2d 546 (6th Cir. 1989) .....	B-2
<i>Bruch v. Firestone Tire &amp; Rubber Co.</i> , 828 F.2d 134 (3d Cir. 1987) .....	8
<i>Brundage-Peterson v. Compicare Health Servs. Ins. Corp.</i> , 877 F.2d 509 (7th Cir. 1989) .....	B-3
<i>Brunner v. Sun Ref. &amp; Mktg. Co.</i> , (Not Reported in F. Supp.), 29 Wage & Hour Cas. (BNA) 505, No. 86 C 20272 (N.D. Ill. May 10, 1989) (WESTLAW, 1989 WL 57710) .....	B-7
<i>Burnham v. Guardian Life Ins. Co. of Am.</i> , 873 F.2d 486 (1st Cir. 1989) .....	15, B-3
<i>Burns v. Louisiana Land &amp; Exploration Co.</i> , 870 F.2d 1016 (5th Cir. 1989).....	13
<i>Combustion Eng'g, Inc. v. Saporito</i> , No. 88-163, 85 U.S.L.W. 3569-70 (U.S. Feb. 27, 1989), <i>vacating and remanding</i> 843 F.2d 666 (3rd Cir. 1988) .....	B-1

## TABLE OF AUTHORITIES - Continued

	Page
<i>Curtis v. Noel</i> , 877 F.2d 159 (1st Cir. 1989) ..	14, 15, 16, B-2
<i>Davidson v. St. Francis Regional Medical Center Employee Group Health Plan</i> , ___ F.Supp. ___, No. A 88-2528-S (D. Kan. June 9, 1989) (WESTLAW, 1989 WL 78261) .....	B-5
<i>Deak v. Masters, Mates &amp; Pilots Pension Plan</i> , 821 F.2d 572 (11th Cir. 1987) .....	18
<i>DeGeare v. Slattery Group, Inc.</i> , No. 87-2070, 57 U.S.L.W. 3569 (U.S. Feb. 27, 1989), <i>vacating and remanding</i> 837 F.2d 812 (8th Cir. 1988) .....	B-1
<i>Dennard v. Richards Group, Inc.</i> , 681 F.2d 306 (5th Cir. 1982) .....	11, 18
<i>Denton v. First Nat'l Bank of Waco, Tex.</i> , 765 F.2d 1295 (5th Cir. 1985) .....	18
<i>Donovan v. Bierwirth</i> , 680 F.2d 263 (2d Cir. 1982), <i>cert. denied</i> , 459 U.S. 1069, 103 S.Ct. 488 (1982) ....	18
<i>Doza v. Crum &amp; Forster Ins. Co.</i> , ___ F.Supp. ___ (D.N.J. May 8, 1989) (WESTLAW, 1989 WL 73467) .....	B-7
<i>Dzinglski v. Weirton Steel Corp.</i> , 875 F.2d 1075 (4th Cir. 1989) .....	B-3
<i>Ferrara v. Allentown Physician Anesthesia Assocs., Inc.</i> , 711 F.Supp. 206 (E.D. Pa. 1989) .....	B-10
<i>Filary v. General Am. Life Ins. Co.</i> , 711 F.Supp. 528 (D. Ariz. 1989) .....	B-7
<i>Firestone Tire &amp; Rubber Co. v. Bruch</i> , ___ U.S. ___, 109 S.Ct. 948 (1989) .....	passim
<i>Garavuso v. Shoe Corps. of Am. Indus., Inc.</i> , 709 F.Supp. 1423 (S.D. Ohio 1989) .....	B-10

## TABLE OF AUTHORITIES - Continued

	Page
<i>Goggans v. Container Corp. of Am.</i> , 714 F.Supp. 282, No. 1-87-467 (S.D. Ohio May 26, 1989) (WEST- LAW) .....	B-6
<i>Gunderson v. W.R. Grace &amp; Co. Long Term Disability Income Plan</i> , 874 F.2d 496 (8th Cir. 1989) .....	B-4
<i>Guy v. Southeastern Iron Workers' Welfare Fund</i> , 877 F.2d 37 (11th Cir. 1989) .....	B-2
<i>Hill v. Bethlehem Steel Corp.</i> , (Not Reported in F.Supp.), Nos. 87-7763, 87-7764 (E.D. Pa. May 6, 1989) (WESTLAW, 1989 WL 60441) .....	B-8
<i>Holian v. Leavitt Tube Co., Inc.</i> , (Not Reported in F.Supp.), No. 89 C 0354 (N.D. Ill. Apr. 28, 1989) (WESTLAW, 1989 WL 44570) .....	B-8
<i>International Bhd. of Elec. Workers, AFL CIO, Local 47 v. Southern Cal. Edison Co.</i> , ___ F.2d ___, No. 88-6075 (9th Cir. July 18, 1989) (WESTLAW, 1989 WL 78170) .....	B-1
<i>Jordan v. Reliable Life Ins. Co.</i> , ___ F.Supp. ___, No. 88-AR-0543-S (N.D. Ala. July 3, 1989) (WEST- LAW, 1989 WL 73303) .....	B-5
<i>Kelley v. American Tel. &amp; Tel. Co.</i> , ___ F.Supp. ___, No. 88-2030-S (D. Kan. June 9, 1989) (WEST- LAW, 1989 WL 78256) .....	B-5
<i>Kocman v. Safeguard Business Sys.</i> , (Not Reported in F.Supp.), No. 88-5127 (E.D. Pa. June 28, 1989) (WESTLAW, 1989 WL 71492) .....	B-5
<i>Lakey v. Remington Arms Co., Inc.</i> , 874 F.2d 541 (8th Cir. 1989) .....	16, B-3
<i>Lowry v. Bankers Life &amp; Cas. Retirement Plan</i> , 871 F.2d 522 (5th Cir. 1989) .....	passim

## TABLE OF AUTHORITIES – Continued

	Page
<i>Lowry v. Bankers Life &amp; Cas. Retirement Plan</i> , 865 F.2d 692 (5th Cir. 1989).....	4, 11, 12, 18
<i>Lowry v. Bankers Life &amp; Cas. Retirement Plan</i> , 678 F.Supp. 635 (N.D. Tex. 1988).....	12, 19
<i>Nissho-Iwai Co., Ltd. v. Occidental Crude Sales, Inc.</i> , 729 F.2d 1530 (5th Cir. 1984).....	17
<i>Parsons v. West Va. Works Hourly Employees Pension Plan</i> , ___ F.2d ___, No. 88-2649 (4th Cir. July 18, 1989) (WESTLAW, 1989 WL 78124).....	B-2
<i>Paul v. Valley Truck Parts, Inc.</i> , (Not Reported in F.Supp.), No. 88 C 7131 (N.D. Ill. Apr. 19, 1989) (WESTLAW, 1989 WL 44586).....	B-9
<i>Pennzoil Co. v. F.E.R.C.</i> , 789 F.2d 1128 (5th Cir. 1986).....	13
<i>Questech, Inc. v. Hartford Accident &amp; Indem. Co.</i> , 713 F.Supp. 956 (E.D. Va. 1989).....	B-6
<i>Reeser v. Esmark, Inc., Pension Bd.</i> , 714 F.Supp. 412, No. 82-8268-A (S.D. Iowa June 9, 1989) (WESTLAW).....	B-6
<i>Retirement &amp; Sec. Program v. Oglethorpe Power</i> , 712 F.Supp. 223 (D.D.C. 1989).....	B-9
<i>Rife v. United Mine Workers of Am. Health &amp; Retirement Funds</i> , 875 F.2d 316 (Table), Unpublished Disposition, No. 88-2871 (4th Cir. May 2, 1989) (WESTLAW).....	B-4
<i>Rizzo v. Caterpillar, Inc.</i> , (Not Reported in F.Supp.), No. 88 C 0080 (N.D. Ill. Apr. 3, 1989) (WESTLAW, 1989 WL 36411).....	B-9
<i>Rodriguez v. MEBA Pension Trust</i> , 872 F.2d 69 (4th Cir. 1989).....	B-4

## TABLE OF AUTHORITIES - Continued

	Page
<i>Rowe v. Allied Chem. Hourly Employees' Pension Plan</i> , No. 88-729, 57 U.S.L.W. 3570 (U.S. Feb. 27, 1989), <i>vacating and remanding</i> 852 F.2d 569 (6th Cir. 1988) .....	B-1
<i>Sandifer v. Central States S.E. &amp; S.W. Areas Pension Fund</i> , 709 F.Supp. 713 (E.D. La. 1989) .....	B-9
<i>Schiller v. Mutual Benefit Life Ins. Co.</i> , 713 F.Supp. 1064 (E.D. Tenn. 1989) .....	B-9
<i>Schultz v. Metropolitan Life Ins. Co.</i> , 872 F.2d 676 (5th Cir. 1989) .....	B-3
<i>Sherlund v. Lincoln Nat'l Life Ins. Co.</i> , (to be reported at: 878 F.2d 1436 (Table)), Unpublished Disposition, No. 88-1585 (6th Cir. July 13, 1989) ...	B-2
<i>Short v. Central States, S.E. &amp; S.W. Areas Pension Fund</i> , 729 F.2d 567 (8th Cir. 1984) .....	8, 9, 17
<i>Stewart v. Borg-Warner Corp.</i> , (Not Reported in F.Supp.), No. 88 C 4258 (N.D. Ill. May 30, 1989) (WESTLAW, 1989 WL 58235) .....	B-6
<i>Stingley v. Tenco</i> , (Not Reported in F.Supp.), No. 88 C 2085 (N.D. Ill. June 8, 1989) (WESTLAW, 1989 WL 65039) .....	B-6
<i>Tomczyk v. Blue Cross &amp; Blue Shield United of Wis.</i> , ___ F.Supp. ___, No. 88-C-690 (E.D. Wis. May 8, 1989) (WESTLAW, 1989 WL 70377) .....	B-8
<i>Wallace v. Cavenham Forest Indus., Inc.</i> , 707 F.Supp. 455 (D. Or. 1989) .....	B-8

## TABLE OF AUTHORITIES – Continued

Page

## STATUTES AND RULES

29 U.S.C. § 1132(a)(1)(B) .....	16
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## OTHER SOURCES

Restatement (Second) of Trusts § 4, Comment d (1959) .....	12
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No. 89-137

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In The  
Supreme Court of the United States  
October Term, 1989

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DONALD A. LOWRY,

*Petitioner,*

v.

BANKERS LIFE AND CASUALTY  
RETIREMENT PLAN, et al.,

*Respondents.*

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On Petition For Writ Of Certiorari  
To The United States Court  
Of Appeals For The Fifth Circuit

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BRIEF IN OPPOSITION

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Respondents, Bankers Life and Casualty Retirement Plan, et al., respectfully pray that this Court deny the Petition for Writ of Certiorari to review the judgment and opinion of the Court of Appeals for the Fifth Circuit in this case.

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## OPINIONS BELOW

The opinion of the District Court, the main opinion of the Court of Appeals and the opinion of the Court of Appeals denying rehearing are set forth in full as appendices to the Petition.

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## STATEMENT OF THE CASE

Petitioner Donald A. Lowry has had five and now seeks a sixth review of his claim for additional retirement benefits from Respondents Bankers Life and Casualty Retirement Plan and Savings Investment Plan (collectively the "Plan"). In 1982 and again in 1983, Petitioner sought and received projections of his retirement benefits under the Plan, anticipating his retirement some years later. The Plan Committee Secretary, Respondent Chester M. Lozowski ("Lozowski"), projected a lump sum retirement benefit of nearly a quarter of a million dollars, based, consistent with uniform practice under the Plan, on Petitioner's salary and personal production commission income. Also consistent with uniform practice, the projection was not based on the more than \$500,000 of overwrite commissions Petitioner was paid for the sales efforts of others in the nine-month period in 1979 during which Petitioner was an independent general agent for Respondent Union Bankers Insurance Company ("Union Bankers"), a subsidiary company of Respondent Bankers Life and Casualty Company ("Bankers"). Although not at the time either of these projections was made, Petitioner later claimed entitlement to an additional lump sum benefit of \$384,533.96 based upon the inclusion of such

overwrite commissions in the compensation base for purposes of calculating benefits. Petitioner asserted his belief that his general agency overwrite commissions should be included even though, as the district court found, he knew general agents had never been included in Bankers' IRS-qualified employee pension plans. (Pet. App. 8c). Upon his retirement in 1986, Petitioner was paid a lump sum retirement benefit, based upon his salary and personal production commissions, of \$253,788.98. His relentless pursuit of the extra \$384,533.96 now extends to this Court.<sup>1</sup>

In 1984, 1985 and 1986, Plan Committee Secretary Lozowski informed Petitioner that general agency commissions were never included in the employee pension funds. In 1986, the full committee (the remaining respondents in this case) (Lozowski and the Committee hereinafter sometimes called "Administrator"), vested under the Plan with authority to determine eligibility for benefits and to interpret and construe the Plan, reviewed and

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<sup>1</sup> Petitioner never incurred a "break in service" under the Plan and received full benefits based on his salary and personal production commissions. The dispute in this case has not been whether Petitioner would remain in the pension program while he was setting up the general agency in 1979, but what payments to him would be included in the compensation base for benefit calculations. Petitioner's reference to Mr. Coffman (Pet. at 4), who did not testify at trial, is irrelevant to the interpretation of the Plan, but is so highly misleading that the pertinent transcript of Petitioner's trial testimony on this subject, (Tr. 38-39, 103-104 and 122-123) taken from the Joint Appendix on Appeal, is reproduced in *Appendix A* hereto.

denied Petitioner's claim. This review included the participation of outside counsel for Petitioner and Respondents. The complete written dialogue, including the legal basis for refusing to include non-employee income in Bankers' IRS-approved qualified employee pension plans, is in the record of the trial court and was before the court below on appeal. After exhausting his review rights under the Plan, Petitioner filed this action in 1987. Petitioner had a full bench trial in February 1988, an appeal before the United States Court of Appeals for the Fifth Circuit and, in 1989, after this Court's decision in *Bruch*, a full and complete assessment of his claim by the Court of Appeals in light of *Bruch*.

The court below recognized the inappropriateness of this case as a vehicle for a general pronouncement beyond the facts of this case (Pet. App. 8a, n.3), but also recognized the serious consequences to the Plan and other beneficiaries if Petitioner's view prevailed (Pet. App. 7a). For convenience, we refer to the original opinion of the court below as *Lowry I* (reported at 865 F.2d 692 and reprinted at Pet. App. A) and to the post-*Bruch* opinion of the court below as *Lowry II* (reported at 871 F.2d 522 and reprinted at Pet. App. B).

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## REASONS FOR DENYING THE WRIT

- I. NO CONFLICT OF AUTHORITY EXISTS TO WARRANT REVIEW BY THIS COURT BECAUSE THE FIFTH CIRCUIT COURT OF APPEALS APPLIED THE CORRECT STANDARD TO REVIEW THE ADMINISTRATOR'S DECISION AND THE ADMINISTRATOR COMMITTED NO ERROR OF LAW IN INTERPRETING THE PLAN.

There are no special or important reasons, under Rule 17 of this Court's rules or otherwise, to issue a writ of certiorari to the United States Court of Appeals for the Fifth Circuit. The court below in *Lowry II* rendered one of the first decisions on the effect of this Court's recent decision in *Firestone Tire & Rubber Co. v. Bruch*, \_\_\_ U.S. \_\_\_, 109 S.Ct. 948 (1989) ("*Bruch*"). The Court of Appeals properly applied this Court's holding in *Bruch* of an abuse of discretion standard in reviewing the Administrator's decision denying benefits and its ruling is consistent with other appellate and district court post-*Bruch* decisions. As this Court's first major decision on the standard of review of ERISA plan determinations, *Bruch* relied upon substantial case law development in the lower courts in the 14 years since the passage of ERISA. Even if this were a case in which the court below misapplied *Bruch*, which it is not, it is much too early for this Court to fine-tune *Bruch* or even to consider taking a case on certiorari which presents the same issues as *Bruch*.

Moreover, the issue of whether the Administrator in this case committed an error of law has been reviewed already by the courts below, once by the district court and twice by the Court of Appeals. In each instance,

Petitioner was unable to prove that the Administrator committed an error of law in applying the rules of construction in his interpretation of the Plan. There is no conflict or inconsistency with any decision of this Court or any appellate court. There is no reason for review by this Court and the Petition should be denied.

**A. THE STANDARD OF REVIEW APPLIED IN LOWRY II PRESENTS NO CONFLICT OF AUTHORITY.**

The Fifth Circuit Court of Appeals in *Lowry II* correctly tied the standard for review of the Administrator's decision to whether the Administrator had been granted the requisite discretionary authority. This Court held in *Bruch*:

Consistent with established principles of trust law, we hold that a denial of benefits challenged under §1132(a)(1)(B) is to be reviewed under a *de novo* standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan.

*Bruch*, \_\_\_ U.S. at \_\_\_, 109 S.Ct. at 956.

The threshold issue in determining the appropriate standard of review does not turn, as Petitioner asserts, on whether the administrator allegedly makes an error of law. Petitioner's rationale seems to be that, notwithstanding any discretion granted the administrator, the administrator may not act with discretion on the law governing the construction of the Plan. Petitioner argues that because the Administrator here incorrectly applied the

law governing construction of contracts, the reviewing Court of Appeals must review the matter *de novo*.

There is no language or reasoning in *Bruch* to support Petitioner's argument. In fact, this Court in *Bruch* explained that under the law of trusts, which is the body of law in which ERISA law is rooted, "[t]rust principles make a deferential standard of review appropriate when a trustee exercises discretionary powers." *Id.* at \_\_\_, 109 S.Ct. at 954. Noting the consistency between trust and pre-ERISA law, this Court stated the principle governing the interpretation of benefit plans before ERISA's enactment:

If the plan did *not* give the employer or administrator discretionary or final authority to construe uncertain terms, the court reviewed the employee's claim as it would have any other contract claim - by looking to the terms of the plan and other manifestations of the parties' intent.

*Bruch*, \_\_\_ U.S. at \_\_\_, 109 S.Ct. at 955 (emphasis added).

Reasoning that it would be inappropriate to read ERISA as allowing "a standard of review that would afford less protection to employees and their beneficiaries than they enjoyed before ERISA was enacted," the Court declined to impose an inflexible standard which would lead to arbitrary and capricious results in many cases. *Id.* at \_\_\_, 109 S.Ct. at 956. Rather, acknowledging that a claim "under an ERISA plan is likely to turn on the interpretation of terms in the plan at issue," this Court held that the administrator's interpretation will *not* be reviewed *de novo* if that administrator was granted discretion to make such a decision. *Id.* (emphasis added).

Petitioner's arguments are quite similar to arguments that prevailed in the appellate court in *Bruch* – but not in this Court. While the Court of Appeals for the Third Circuit in *Bruch* based its decision to employ a *de novo* standard on factors such as whether a question of law was before the plan administrator or whether the plan was funded versus unfunded, this Court rejected such factors as the proper basis for such a decision. *Bruch v. Firestone Tire & Rubber Co.*, 828 F.2d 134, 144, 148 (3d Cir. 1987). Instead, this Court adopted as the *only* determinative factor the grant of discretionary authority to the plan administrator; the other factors – while important to a determination at the secondary level – are not threshold issues but are merely to be considered in deciding whether the administrator acted within his discretion. *Bruch*, \_\_\_ U.S. at \_\_\_, 109 S.Ct. at 956.

There is no validity to Petitioner's argument that *Bruch* requires a court to review the interpretation of a plan by an administrator, notwithstanding the grant of discretion, under a *de novo* standard. The cases cited by Petitioner fail to support this argument.

Petitioner cites *Short v. Central States, Southeast & Southwest Areas Pension Fund*, 729 F.2d 567 (8th Cir. 1984), for the proposition that an error of law should be reviewed "with a legal *de novo* review and *not* by an arbitrary and capricious fact review test." (Pet. at 9) (emphasis is Petitioner's). However, *Short* did not so hold. In this pre-*Bruch* case, the Court of Appeals for the Eighth Circuit merely stated that "in reviewing a decision of the trustees, a federal court is *not* to hold a *de novo* factual hearing which would allow for the admission of new evidence. Rather, the conflict must focus on the

evidence which was before the trustees when the final decision was made." *Short*, 729 F.2d at 571. The court affirmed the district court's reversal of the plan administrator, stating that the court was correct in its conclusion that the claimants were employees under the terms of the benefit plan. *Id.* at 573. Nowhere in its *Short* opinion did the Court of Appeals for the Eighth Circuit hold that when it reviews a question of law, it must conduct a "*de novo*" review.

Furthermore, the holding of the Court of Appeals in *Lowry II* is *not* in conflict with that of the Fourth Circuit in *Boyd v. Trustees of the United Mine Workers Health & Retirement Funds*, 873 F.2d 57 (4th Cir. 1989), as Petitioner suggests. (Pet. at 10). Contrary to Petitioner's assertion, *Boyd* does not set out a rule that legal questions are outside an administrator's discretion and must be reviewed *de novo*. Rather, *Boyd* follows *Bruch* in a fashion identical to *Lowry II*.

The issue on appeal in *Boyd* was the plan administrator's interpretation of coverage for an injured mine worker under the union's disability benefits plan. Citing *Bruch*, the Court in *Boyd*, as in *Lowry II*, first determined whether the plan administrator has been granted discretionary authority to determine eligibility and to construe the plan terms. *Boyd*, 873 F.2d at 59. Finding that such discretion was granted, the Court in *Boyd*, as in *Lowry II*, then applied the abuse of discretion standard required by *Bruch*. *Id.* Even though the issue on appeal was whether the administrator's interpretation of the plan was in accord with controlling case law – an error of law according to Petitioner (Pet. at 10) – the Court of Appeals

reviewed the administrator's decision under the abuse of discretion standard. *Boyd*, 873 F.2d at 60.

Certainly the Court of Appeals in *Boyd* acknowledged the importance of an administrator's following precedential case law that "sets bounds on the range of discretion that the Pension Plan confers on the Trustees to deny claims. . . ." *Id.* at 60 (emphasis added). But that court did *not*, as Petitioner suggests, hold that the abuse of discretion standard was inapplicable, and that a *de novo* review applied, merely because some legal question was presented. Rather, the court recognized that the range of discretion may be limited by legal principles and reviewed the exercise of discretion in light of the applicable legal principles.

Such an analysis of the administrator's decision is almost identical to that in *Lowry II*. In *Lowry II*, the Court of Appeals did not refuse to review legal issues, or somehow obfuscate the possibility of the Administrator ignoring or incorrectly applying the relevant laws of construction. The Court acted in conformance, not in conflict, with the relevant case authority.

**B. THE COURTS BELOW HAVE REVIEWED THE ALLEGATIONS OF AN ERROR OF LAW BY THE ADMINISTRATOR IN INTERPRETING THE PLAN AND HAVE FOUND NO ERROR.**

This Court does not need to take this case on certiorari to do what the courts below have done three times already – review the Administrator's decision denying benefits for a possible error of law. While Petitioner finds a new fabric in which to cloak his allegation of an error of

law, it is the same worn argument he asserted and lost in the district court and twice in the court below, first on initial appeal and then in a post-*Bruch* attempt at rehearing. Hence, in addition to having absolutely no legal basis for asserting that controlling law requires a *de novo* review of the Administrator's decision for an error of law, Petitioner has no basis for bringing this already reviewed alleged error to this Court's attention.

On the main appeal and on petition for rehearing before the Fifth Circuit Court of Appeals, both sides fully briefed the issue of whether the Administrator construed the Plan within the proper legal confines.<sup>2</sup> The Court in *Lowry II* pointed out that it had reviewed the Administrator's decision already, and stated, "[o]ur earlier opinion and the opinion of the district court make clear that the plan administrators in this case did not abuse their discretion." *Lowry II*, 871 F.2d at 525 (Pet. App. 6b).

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<sup>2</sup> For example, in Appellant's Petition for Rehearing, Petitioner argued that the Fifth Circuit Court's decision in *Lowry I* "is in direct conflict with *Dennard* and *Firestone* as well as the numerous decisions cited herein and in Appellant's original Brief for the proposition that ERISA trustees must follow the common law of contractual construction, using and respecting the Parole [sic] Evidence Rule, in determining the correct legal meaning of a plan." Appellant's Petition for Rehearing at 13. Appellees responded, as they had on the main appeal, that no ERISA decision ever applied or referred to the "parol evidence rule" or the so-called "Rule of Four Corners," that such doctrines were inapposite in ERISA cases and that

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In *Lowry I*, the court conducted a complete review of the Administrator's decision construing the Plan, which review included a determination of the correct interpretation of the Plan and the factors underlying the Administrator's interpretation. *Lowry I*, 865 F.2d at 694 (Pet. App. 5a and 6a). Despite Petitioner's repeated attempts to call Plan language in this case "clear," the courts below did not agree. After analyzing the Plan language and the Administrator's interpretation, the Court found that "the language is not crystal clear on its face and does not exist in a vacuum," and affirmed the district court's upholding of the Administrator. *Lowry I*, 865 F.2d at 695 (Pet. App. 7a). Both *Lowry I* and the district court considered whether the Administrator's interpretation of the Plan was a legally correct one. *Lowry I*, 865 F.2d at 694-6. (Pet. App. 5a); *Lowry v. Bankers Life & Cas. Retirement Plan*, 678 F.Supp. 635, 640-2. (Pet. App. 9c and 10c).

The references by Petitioner to the statute governing judicial review of agency determinations is yet another attempt to dress up the bare assertions that the Court below reviewed the Administrator's decision under the wrong standard. (Pet. at 10-11). Aside from the fact that Petitioner fails to explain why in an ERISA action an

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this argument was flatly inconsistent with *Bruch*: " 'The terms of trusts created by written instruments are determined by the provisions of the instrument as interpreted in light of all the circumstances and such other evidence of the intention of the settlor with respect to the trust as is not inadmissible.' Citing Restatement (Second) of Trusts §4, Comment d (1959) (emphasis added)."-Response Brief of Appellees at 16-17, quoting *Bruch*, \_\_\_ U.S. at \_\_\_, 109 S. Ct. at 955.

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analogy to a statutory imposition of review for government agency decisions is appropriate, Petitioner also ignores *Bruch's* command that "[i]n determining the appropriate standard of review for actions under §1132(a)(1)(B), we are guided by principles of *trust law*." *Bruch*, \_\_\_ U.S. at \_\_\_, 109 S.Ct. at 954 (emphasis added).<sup>3</sup>

Moreover, Petitioner fails to discuss the fact that *Pennzoil*, the case he cites as the leading decision in the Fifth Circuit regarding the allegedly appropriate standard of review, actually *supports* the Administrator's application of the law of contract construction. See *Pennzoil Co. v. F.E.R.C.*, 789 F.2d 1128 (5th Cir. 1986). The court in *Pennzoil* stated that in construing a contract, while one must consider the language of the contract, extrinsic evidence "is relevant to prove a meaning to which the language of the instrument is reasonably susceptible." *Id.* at 1140, quoting *Pennzoil Co. v. F.E.R.C.*, 645 F.2d 360, 388 (5th Cir. 1981), *cert. denied* 454 U.S. 1142, 102 S.Ct. 1000 (1982). *Pennzoil* adds nothing to an analysis of the appropriate standard of review in this non-administrative proceeding but, if considered, significantly undermines Petitioner's assertion that the Administrator's decision, thrice affirmed in the courts below, was premised on an error of law in interpreting the Plan in this case.

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<sup>3</sup> Petitioner's reliance on *Burns v. Louisiana Land & Exploration Co.*, 870 F.2d 1016 (5th Cir. 1989) (Pet. at 13, n.6) is likewise inapposite. If the Rule of Four Corners has any application to this case, it is to confine Petitioner to a reasonable zone of legal authority for this case. *Burns* is, as conceded by Petitioner, "outside ERISA" and otherwise provides no authority for any issue before this Court. (See *supra* note 2.)

**C. LOWRY II IS CONSISTENT WITH THE  
POST-BRUCH DECISIONS BY OTHER  
APPELLATE AND DISTRICT COURTS.**

In addition to the fact that *Lowry II* properly follows this Court's decision in *Bruch*, this Court should deny the Writ of Certiorari since *Lowry II* is consistent with at least 17 decisions of various United States Courts of Appeal and more than 20 decisions of various United States District Courts which, subsequent to *Bruch*, have either applied, interpreted or cited *Bruch* and its new standards of review. See Appendix B hereto. Following *Bruch*, these courts properly held that in determining which standard of review to apply, a court must first determine whether the administrator or fiduciary of the plan in dispute has been granted "discretionary authority to determine eligibility for benefits or to construe the terms of the plan." *Bruch*, \_\_\_ U.S. at \_\_\_, 109 S.Ct. at 956. If the administrator or fiduciary possesses the requisite discretionary authority, as did the Administrator here, these courts properly apply *Bruch* and hold that a *de novo* standard of review does not apply.

The United States Court of Appeals for the First Circuit, in *Curtis v. Noel*, 877 F.2d 159 (1st Cir. 1989), applied *Bruch* to an action in which a retired employee of an insurance company sought an upward recalculation of his retirement benefits, claiming that he was entitled to additional benefits based upon "incentive compensation" which he had received in addition to his annual salary. *Id.* at 160-61. Plaintiff's "incentive compensation," much like Petitioner's in this case, consisted of commissions computed upon a percentage of the overall insurance premiums paid to his employer. *Id.* at 160. In refusing to

include this special remuneration in the calculation of plaintiff's retirement benefits, the administrator of the retirement plan relied upon a provision of the retirement plan. Under such provision, "special remuneration which would not ordinarily be considered compensation for job-related services" would be excluded from the computation of "annual earnings" used in calculating retirement benefits. *Id.* at 161. In making this determination, the administrator reasoned that the "incentive compensation" at issue fell within the exclusion since the payments were illegal under a state statute. *Id.*

The court in *Curtis* held that the administrator acted properly in denying plaintiff the additional retirement benefits sought, applying a deferential standard of review since the administrator possessed the discretionary authority to make such determinations. *Id.* In so holding, the court properly applied the teaching of *Bruch* as stating that "[t]rust principles make a deferential standard of review appropriate when a trustee exercises discretionary powers. . . . A trustee may be given power to construe disputed or doubtful terms, and in such instances the trustee's interpretation will not be disturbed if reasonable." *Id.* at 161, quoting *Bruch*, \_\_\_ U.S. at \_\_\_, 109 S.Ct. at 952. Cf., *Burnham v. Guardian Life Ins. Co. of Am.*, 873 F.2d 486, 489 (1st Cir. 1989) (a post-*Bruch* but pre-*Curtis* decision, silent on the subject of whether the defendant insurer had discretionary authority, affirmed the district court's summary judgment which upheld the insurer's decision as reasonable regardless of whether a *de novo* or deferential standard was required by *Bruch*).

The facts of *Curtis* and those of the instant case are analogous, and the holdings are consistent with each other and with *Bruch*. As *Curtis* aptly illustrates, *Lowry II* is within the letter and spirit of *Bruch* and of other federal courts which have applied *Bruch*.

In *Lakey v. Remington Arms Co., Inc.*, 874 F.2d 541 (8th Cir. 1989), the United States Court of Appeals for the Eighth Circuit analyzed the new standards of review enunciated in *Bruch* with respect to a class action brought by several plaintiffs against their former employer seeking a declaratory judgment that the employer's refusal to grant them severance benefits violated Section 1132(a)(1)(B) of ERISA. *Lakey*, 874 F.2d at 542. On appeal, plaintiffs claimed that the district court erred in failing to review their ERISA claim *de novo*. *Id.* at 543. The Eighth Circuit interpreted Justice O'Connor's opinion in *Bruch* as holding that a fiduciary or administrator's benefit determination is not to be reviewed *de novo* if a court determines that discretionary power had been granted to the benefit plan's fiduciary or administrator to construe its terms. *Id.* at 544. Since the employer in *Lakey* had full "power to construe the uncertain terms in its benefit plan," the court held that the *de novo* standard of review did not apply and that the district court's denial of benefits was "lawful under ERISA so long as the decision was not arbitrary and capricious." *Id.* at 544-45 (emphasis added).

Petitioner's main argument for granting the writ should be rejected and the petition should be denied.

II. PETITIONER'S CONFLICT OF INTEREST ALLEGATION WAS PROPERLY REJECTED BY THE COURT OF APPEALS AND RAISES NO ISSUE UNDER *BRUCH*.

Petitioner's second argument for granting the writ (Pet. at 17) is also without merit and presents no *Bruch* issue. The Fifth Circuit Court of Appeals in *Lowry II* declined to hear on rehearing Petitioner's allegation – made for the first time on rehearing – that the Administrator was acting under a conflict of interest. This holding is entirely consistent with controlling case law and is not, by any stretch of the imagination, in conflict with *Bruch*.

The Court of Appeals in *Lowry II* acknowledged *Bruch*'s holding that an alleged conflict of interest of an administrator with discretionary authority must be considered in determining whether there is an abuse of discretion. *Lowry II*, 871 F.2d at 525 n.6, quoting *Bruch*, \_\_\_ U.S. at \_\_\_, 109 S.Ct. at 950 [sic]. *Accord*, *Bali v. Blue Cross & Blue Shield Ass'n*, 873 F.2d 1043, 1047, n.5 (7th Cir. 1989) (noting that under *Bruch* "the existence of a conflict of interest does not alter the applicable standard"). However, the issue must be timely raised and nothing in *Bruch* changes that requirement.

In *Lowry II*, the court below stated that "*Lowry* did not present the conflict of interest argument to us on his initial appeal, and we will not consider it now. *See, e.g. Nissho-Iwai Co., Ltd. v. Occidental Crude Sales, Inc.*, 729 F.2d 1530, 1549 (5th Cir. 1984)." *Lowry II*, 871 F.2d at 525. The court correctly added that the conflict of interest allegation should have been raised even under the pre-*Bruch* arbitrary and capricious standard. *Id.*

The two leading cases in the Fifth Circuit prior to *Lowry I* and *Lowry II* include alleged bias as a factor in the formulation of the arbitrary and capricious standard. See *Denton v. First Nat'l Bank of Waco, Tex.*, 765 F.2d 1295, 1304 (5th Cir. 1985); *Dennard v. Richards Group*, 681 F.2d 306, 313-314 (5th Cir. 1982). In *Denton*, the Court of Appeals, citing *Dennard*, stated that " '[W]e also view as probative of the good faith of a trustee or administrator the following factors: . . . (3) factual background of the determination by a Plan and inferences of lack of good faith, if any. The fact that a trustee's interpretation is not the correct one as determined by a district court does not establish in itself arbitrary and capricious action, but is a factor in that determination.' " *Denton*, 765 F.2d at 1304 (quoting *Dennard*, 681 F.2d at 314 (additional citation omitted)) (emphasis is the court's). It is noteworthy that these principles outlined in *Denton* and *Dennard* were applied by the district and appellate courts below. See, e.g. *Lowry I*, 865 F.2d at 694 (Pet. App. 5a).

In addition, the case law outside the Fifth Circuit indicates that the conflict of interest should have been raised by Petitioner at least in his initial appeal, if not at trial. The Court of Appeals for the Second Circuit explained the relevance of inquiring into the inherent dangers in a benefit plan administrator maintaining conflicting fiduciary duties. *Donovan v. Bierwirth*, 680 F.2d 263, 271 (2d Cir. 1982), cert. denied, 459 U.S. 1069, 103 S.Ct. 488 (1982). See also *Deak v. Masters, Mates & Pilots Pension Plan*, 821 F.2d 572 (11th Cir. 1987) (reviewing alleged breach of duty under ERISA by administrator with fiduciary duties to both union or employee and to plan beneficiaries).

Petitioner's assertion that the Administrator operated under an "undisputed conflict of interest" (Pet. at

17) is without any basis in the record or in fact. Implicit in the district court's opinion is the lack of bias, *e.g.* "Consistent with the treatment of all employees and all general agents. . . ." *Lowry*, 678 F.Supp. at 639 (Pet. App. 8c). Moreover, this Court in *Bruch* suggested a limited approach to reviewing an alleged conflict: "Because we do not rest our decision on the concern for impartiality that guided the Court of Appeals . . . , we need not distinguish between types of plans or focus on the motivations of plan administrators and fiduciaries." *Bruch*, \_\_\_ U.S. at \_\_\_, 109 S.Ct. at 956.<sup>4</sup>

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<sup>4</sup> In *Lowry II*, the Court of Appeals explained that the Plan at issue does not lend itself to the type of conflict alleged in *Bruch*, and any alleged conflict should be considered only as one factor in the court's abuse of discretion review. The court stated in a footnote:

7. Incidentally, we note that with respect to the unfunded plan at issue in *Bruch*, "every dollar provided in benefits is a dollar spent by . . . Firestone, the employer; and every dollar saved by the administrator on behalf of his employer is a dollar in Firestone's pocket." *Bruch v. Firestone Tire & Rubber Co.*, 828 F.2d 134, 144 (3d Cir. 1987). In contrast, the Retirement Plan in this case is a funded, defined-benefit plan. "[I]n these defined-benefit plans, the immediate impact of a decision to grant or deny benefits is on the trust itself and not on the employer; only if the total of all claims paid exceeds the actuarially anticipated amounts would benefit decisions by a trustee have a financial impact on the employer." Brief for Respondents at n. 19, *Firestone Tire & Rubber Co. v. Bruch*, No. 87-1054 (available at LEXIS, Genfed Library. Briefs File).

*Lowry II*, 871 F.2d at 525-526. (Pet. App. 8b).

The opinion of the court below in *Lowry II* is completely consistent with *Bruch* as to the conflict of interest issue. Petitioner has wandered far afield from the state of the law governing this issue. In the Fifth Circuit, even before *Bruch*, an alleged conflict of interest was relevant to a review of the administrator's decision. However, Petitioner here, unlike that in *Bruch*, has failed to raise the issue timely. This Court should reject Petitioner's second reason for granting a writ; Petitioner, after three reviews of this matter, should not now be allowed to raise an alleged bias on the part of the Administrator and cannot do so on the authority of *Bruch*.

**III. THE COURT OF APPEALS CORRECTLY HELD THE PLAN GIVES THE ADMINISTRATOR DISCRETIONARY AUTHORITY TO DETERMINE ELIGIBILITY FOR BENEFITS AND TO CONSTRUE THE TERMS OF THE PLAN.**

In *Lowry II*, the Court of Appeals, following *Bruch*, made a threshold inquiry as to whether the Plan terms granted discretionary authority to the Administrator, and concluded that they did. The Court's inquiry followed the test laid out in *Bruch*: whether "the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." *Lowry II*, 871 F.2d at 523, quoting *Bruch*, \_\_\_ U.S. at \_\_\_, 109 S.Ct. at 956.

Petitioner's argument that the Court of Appeals erred in its holding that the requisite discretion was granted is premised on Petitioner's flawed and far-reaching reading of the holding in *Bruch*. Petitioner concocts

his own test for determining whether the plan terms grant discretion, altering this Court's holding in *Bruch*. Under Petitioner's test, a court is to ask whether the plan establishes an "independent" ERISA administrator and grants "explicit irrevocable" authority to construe "uncertain" terms. (Pet. at 21). Petitioner attempts to inject these terms into the *Bruch* test despite the fact that *Bruch* does not use these as touchstones of a grant of discretionary authority. Nothing in *Bruch* requires that the administrator be "independent;" in fact, lack of independence, as explained *supra* in Part II, is a factor to be weighed *after* the abuse of discretion standard has been found to be applicable. Similarly, nothing in *Bruch* requires the grant to be one of "explicit irrevocable" authority or to specify that it applies solely to "uncertain" terms.

Moreover, the Court of Appeals in *Lowry II* thoroughly reviewed the language of the Plan in view of *Bruch*. The Court held that the requisite discretion was granted, noting, "We reach our result as a matter of law because the relevant plan language is not ambiguous." *Lowry II*, 891 F.2d at 525, n.5. It is important to note that Petitioner does not claim that the Court of Appeals has misconstrued the meaning of the Plan terms, only that the terms do not grant the type of discretionary authority that Petitioner alleges must be granted. Respondents, apparently as was the Court of Appeals, are at a loss to know how much closer the grant of discretion could be to the type envisioned in *Bruch*.

Further, the test as read and applied in *Lowry II* is consistent with other post-*Bruch* decisions. In *Boyd*, for

example, the Court of Appeals for the Fourth Circuit reviewed the plan at issue to determine whether it granted "discretionary authority to determine eligibility for benefits or to construe the terms of the plan." 873 F.2d at 59, quoting *Bruch*, \_\_\_ U.S. at \_\_\_, 109 S.Ct. at 956. The court held that the requisite discretion was granted, in that the plan terms gave the trustees power to make " 'full and final determination as to all issues concerning eligibility of benefits' " and " 'to promulgate rules and regulations to implement this Plan. . . . ' " *Boyd*, 873 F.2d at 59. See also the cases set forth in *Appendix B* hereto.

Petitioner has misread the test spelled out in *Bruch*. The Court of Appeals decision in *Lowry II*, finding that the requisite discretionary authority was granted, squares with the holdings in *Bruch* and other post-*Bruch* cases. This Court should reject Petitioner's third argument for granting a writ.

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## CONCLUSION

This Court should deny the Petition for Writ of Certiorari. The reasons asserted by Petitioner for granting the writ are devoid of any issue that warrants this Court's review. There is no conflict of authority, direct or tangential, between *Lowry II* and *Bruch*, *Boyd* or any other relevant case. This Court should not allow Petitioner to have a fourth grab at the ring, his having already argued and lost the issues raised in the Petition, with full and complete treatment of *Bruch*-related issues.

For the reasons set forth in this Brief and for the reasons stated by the Court of Appeals in *Lowry II*, this Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX A

Excerpts from February 1, 1988 trial testimony of Donald A. Lowry

\* \* \*

Q (By Mr. Adams) Now, at some point in time, Mr. Lowry, did you contemplate – Well, hold on, I think I've left something out. Before I go on to this, let me ask you. Back in 1979 when you were talking with Mr. Coffman about accepting a change in position and accepting a general agency contract, Exhibit 2, did you discuss or contemplate retirement benefit treatment for your 1099 income?

MR. REYNOLDS: Your Honor, I object to that question as compound and as calling for, apparently calling for an agreement that would vary the terms of the written documents that Plaintiff has already put in evidence.

THE COURT: Overruled.

A Yes. My most important concern in March or a little prior to 79 was to remain on the company payroll. I had already had approximately, I guess, twenty-nine years or thirty years, whatever it may have been, and I did not want to give up my retirement program. Mr. Coffman said, "All right, fine." How does it work? He says, "As long as you're on the company payroll you remain in the pension program." The agreement was that, yes, I would do this under the conditions, and that was my most important condition was that I would remain in the company program. Mr. Coffman was not an expert on the program, he didn't really know too much about it. He was rather new, I believe less than two years with the corporation. But in any event, that was my consideration

to him that I would do this if I remained in the company pension program, retirement program.

Q (By Mr. Adams) And at that time you knew in order to do that, you had to remain on the home office payroll?

A That's right.

Q Okay. And as far as you know, have you always remained on the home office payroll?

A I've always been on the home office payroll.

[Lowry-Direct-Tr.38/39; J.A. 81/82]

\* \* \*

Q Well, your position is that the pension plan benefits were to be included and that was part of the deal from the outset?

A Yes.

Q Now, when you said you talked to Mr. Coffman about staying in the pension plan this morning, I take it you didn't discuss those commissions as a separate item?

A I did not.

Q You just said, "I want to stay in the pension plan?"

A Correct.

Q Mr. Coffman, as you said, he was new in the company, he didn't know what the provisions were, correct?

A I didn't know the provisions either, neither one of us did, but I knew a little bit more about it than he did.

Q Well, you know there's no dispute between us, between you and our clients, on the fact that you continued to be a participant in the pension plan, correct?

A Correct.

Q Right?

A Correct.

Q And that transition salary which has now been introduced in the record as Plaintiff's Exhibit 3 for Seventy-Six Thousand Dollars for 1979, you understand that contributions for the pension plan were made for every dime of that?

A Yes.

[Lowry-Cross-Tr.103/104; J.A. 111/112]

\* \* \*

Q Mr. Lowry, you admit that you're entitled to only those benefits that the plan covers; isn't that correct?

A Yes sir.

Q We don't have a dispute about realiy what somebody said or didn't say was included, we have the dispute about whether you're in the plan for the purpose of those 1099 commissions, correct?

A That's correct.

Q No special deal for Don Lowry?

A No sir.

Q That was your understanding then and now?

A Yes sir.

\* \* \*

[Lowry-Cross-Tr.122/123; J.A. 120-A/121]

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## APPENDIX B

As of the date of this writing, the three cases remanded by this Court on February 27, 1989 (*DeGeare v. Slattery Group, Inc.*, No. 87-2070, 57 U.S.L.W. 3569 (U.S. Feb. 27, 1989), *vacating and remanding* 837 F.2d 812 (8th Cir. 1988); *Combustion Engineering, Inc. v. Saporito*, No. 88-163, 35 U.S.L.W. 3569-70 (U.S. Feb. 27, 1989), *vacating and remanding* 843 F.2d 666 (3rd Cir. 1988); and *Rowe v. Allied Chem. Hourly Employs.*, No. 88-729, 57 U.S.L.W. 3570 (U.S. Feb. 27, 1989), *vacating and remanding* 852 F.2d 569 (6th Cir. 1988)) for further consideration in light of *Bruch* have not been reported in published form.

A. This Court's decision in *Bruch* has been applied, interpreted or cited by United States Courts of Appeal in the following cases, in addition to the Court of Appeals in *Lowry II*:

1. *Batchelor v. International Bhd. of Elec. Workers Local 861 Pension & Retirement Fund*, 877 F.2d 441, 442-43 (5th Cir. 1989) (July 20, 1989) (citing *Lowry II*, the abuse of discretion standard was applied in light of *Bruch* to review trustees' calculation of employee's past service credits since trustees were granted broad discretionary authority to interpret the terms of the pension plan).
2. *International Bhd. of Elec. Workers, AFL-CIO, Local 47 v. Southern Cal. Edison Co.*, \_\_\_ F.2d \_\_\_, No. 88-6075 (9th Cir. July 18, 1989) (WESTLAW, 1989 WL 78170) (labor organization's breach of contract claim remanded for determination under *de novo* standard of review required by application of *Bruch* since employer was not given discretionary authority under the terms of the disputed health care plan).

3. *Parsons v. West Va. Works Hourly Employees Pension Plan*, \_\_\_ F.2d \_\_\_, No. 88-2649 (4th Cir. July 18, 1989) (WESTLAW, 1989 WL 78124) (denial of incapacity retirement benefits under pension plan governed by ERISA reviewed *de novo* under *Bruch* since pension plan did not confer upon its administrator discretionary authority to construe the plan's terms).
4. *Sherlund v. Lincoln Nat'l Life Ins. Co.*, (to be reported at: 878 F.2d 1436 (Table)), Unpublished Disposition, No. 88-1585 (6th Cir. July 13, 1989) (WESTLAW) (when trustee of an ERISA plan is not granted discretion, under *Bruch*, his determinations under the benefit plan will be reviewed *de novo*).
5. *Guy v. Southeastern Iron Workers' Welfare Fund*, 877 F.2d 37, 39 (11th Cir. 1989) (July 11, 1989) (withholding of medical benefits under self-funded employee benefit plan was held unlawful under ERISA applying arbitrary and capricious standard of review which was deemed appropriate under *Bruch* since plan's trustees were granted discretion to construe provisions of the trust).
6. *Curtis v. Noel*, 877 F.2d 159, 161 (1st Cir. 1989) (June 21, 1989) (following *Bruch*, *de novo* standard of review did not apply to retired insurance company employee's claim seeking an upward recalculation of his retirement benefits since administrator of retirement plan had discretionary authority to interpret terms of the plan).
7. *Brown v. Ampco-Pittsburgh Corp.*, 876 F.2d 546, 550 (6th Cir. 1989) (June 7, 1989) (action challenging employer's computation of severance pay benefits remanded to district court for *de novo* review in view of *Bruch* since employer had not been granted discretion to determine benefit eligibility).

8. *Brundage-Peterson v. Compcare Health Servs. Ins. Corp.*, 877 F.2d 509, 511-12 (7th Cir. 1989) (June 5, 1989), (new standard of review in light of *Bruch* is the *de novo* standard unless the administrator or fiduciary of the subject benefit plan is granted discretionary authority to determine eligibility for benefits or to construe the terms of the plan).
9. *Dzinglski v. Weirton Steel Corp.*, 875 F.2d 1075, 1079 (4th Cir. 1989) (May 19, 1989) (*de novo* standard of review was applied pursuant to *Bruch* to terminated employee's action seeking to require retirement committee to disclose its reasons for denying claimant early retirement benefits since the committee was not vested with discretionary authority).
10. *Schultz v. Metropolitan Life Ins. Co.*, 872 F.2d 676, 678 (5th Cir. 1989) (May 12, 1989) (district court's review of health insurance plan administrator's denial of former employee's claim tested in light of *Bruch* based on *de novo* standard of review since insurance plan did not give its administrator discretionary authority to determine benefit eligibility or to construe the plan's terms).
11. *Lahey v. Remington Arms Co., Inc.*, 874 F.2d 541, 544-45 (8th Cir. 1989) (May 10, 1989) (since employer had discretionary power to construe the uncertain terms in its employee benefit plan, arbitrary and capricious standard was applied in light of *Bruch* to class action brought by employees to determine whether employer's denial of severance benefits was unlawful under ERISA).
12. *Burnham v. Guardian Life Ins. Co. of Am.*, 873 F.2d 486, 489 (1st Cir. 1989) (May 3, 1989) (remand not necessary in light of *de novo* standard of review set forth in *Bruch* since district judge made alternative finding that regardless of whether a deferential standard of review or a more stringent test

was applied, plaintiff's death benefit claim was reasonably refused).

13. *Gunderson v. W.R. Grace & Co. Long Term Disability Income Plan*, 874 F.2d 496, 498-99 (8th Cir. 1989) (May 3, 1989) (without stating which standard of review applied, affirmed the district court's grant of summary judgment in favor of plaintiff, finding that the disability income plan's decision to terminate plaintiff's benefits was unreasonable under either an arbitrary and capricious standard or under the *de novo* standard).
14. *Rife v. United Mine Workers of Am. Health & Retirement Funds*, 875 F.2d 316 (Table), Unpublished Disposition, No. 88-2871 (4th Cir. May 2, 1989) (WESTLAW) (affirmed grant of summary judgment in favor of retirement fund trustees' holding that even if district court had applied the *de novo* standard of review set forth in *Bruch*, the district court would have correctly ruled that the plaintiff was ineligible for pension benefits under the disputed pension plan).
15. *Bali v. Blue Cross & Blue Shield Ass'n.*, 873 F.2d 1043, 1047 (7th Cir. 1989) (May 1, 1989) (*de novo* standard of review inappropriate under *Bruch* since administrator of employee benefit and compensation committee had been vested with discretionary authority).
16. *Boyd v. Trustees of the United Mine Workers Health & Retirement Funds*, 873 F.2d 57, 59 (4th Cir. 1989) (Apr. 21, 1989) (trustees' decision to deny claimant's disability pension benefits reviewed under abuse of discretion standard under *Bruch* since trustees of pension plan had discretionary authority to make benefit eligibility determinations).
17. *Rodriguez v. MEBA Pension Trust*, 872 F.2d 69, 73 (4th Cir. 1989) (Apr. 7, 1989) (decision did not depend upon the standard of review applied, but

*Bruch* was interpreted as holding that benefit eligibility determinations by plan trustees are subject to *de novo* review absent a plan provision for the exercise of discretion by trustees).

B. This Court's decision in *Bruch* has been applied, interpreted or cited by United States District Courts in the following cases:

1. *Jordan v. Reliable Life Ins. Co.*, \_\_\_ F.Supp. \_\_\_, No. 88-AR-0543-S (N.D. Ala. July 3, 1989) (WESTLAW, 1989 WL 73303) (*Bruch* did not affect the standard of review applied to fiduciary's denial of beneficiary's life insurance claim since fiduciary conceded at trial that its denial of beneficiary's claim should be reviewed *de novo*).
2. *Kocman v. Safeguard Business Sys.*, (Not Reported in F.Supp.), No. 88-5127 (E.D. Pa. June 28, 1989) (WESTLAW, 1989 WL 71492) (arbitrary and capricious standard applied in light of *Bruch* since defendant's employee benefits plan gave its administrator discretionary authority to determine eligibility for benefits).
3. *Davidson v. St. Francis Regional Medical Center Employee Group Health Plan*, \_\_\_ F.Supp. \_\_\_, No. A88-2528-S (D. Kan. June 9, 1989) (WESTLAW, 1989 WL 78261) (*de novo* standard was applied in light of *Bruch* in reviewing the denial of certain medical benefits under a health care plan since the plan in question did not give its administrator discretionary authority to make eligibility determinations or to construe the terms of the plan).
4. *Kelley v. American Tel. & Tel. Co.*, \_\_\_ F.Supp. \_\_\_, No. 88-2030-S (D. Kan. June 9, 1989) (WESTLAW, 1989 WL 78256) (applied *de novo* standard of review in light of *Bruch* without mention of alternate standard which would apply if administrator had discretion to review employer's denial of plaintiff's separation benefits).

5. *Stingley v. Tenco*, (Not Reported in F.Supp.) No. 88 C 2085 (N.D. Ill. June 8, 1989) (WESTLAW, 1989 WL 65039) (employer's decision to terminate plaintiff's leave of absence would not be disturbed unless it was an abuse of discretion under *Bruch* since decision to extend leave of absence was within employer's discretion).
6. *Reeser v. Esmark, Inc., Pension Bd.*, 714 F.Supp. 412 (S.D. Iowa 1989) (June 6, 1989) (district court held that, under *Bruch* requirements, plan administrator was granted sole discretion to interpret meaning and intent of plan and, therefore, court considered alleged errors of law in interpreting plan terms under arbitrary and capricious, rather than *de novo*, standard).
7. *Questech, Inc. v. Hartford Accident & Indem. Co.*, 713 F.Supp. 956, 962-63 (E.D. Va. 1989) (June 1, 1989) (even where no discretion was granted, *de novo* standard of review was not appropriate where insurance company denied plaintiff's claim under an accidental death policy since the question decided by the plan fiduciary was a factual one, not one of plan construction).
8. *Stewart v. Borg-Warner Corp.*, (Not Reported in F.Supp.) No. 88 C 4258 (N.D. Ill. May 30, 1989) (WESTLAW, 1989 WL 58235) (*de novo* standard of review applied in light of *Bruch* since the disability plan did not give its administrator discretionary authority to construe the terms of the plan).
9. *Goggans v. Container Corp. of Am.*, 714 F.Supp. 282, \_\_\_, No. 1-87-467 (S.D. Ohio May 26, 1989) (WESTLAW) (action brought by former employees seeking severance pay is subject to *de novo* review rather than review under an arbitrary and capricious standard unless the benefit plan gives its administrator or fiduciary discretionary authority to determine benefit eligibility or to construe the terms of the plan).

10. *Adams v. Avondale Indus., Inc.*, 712 F.Supp 1291, 1294 (S.D. Ohio 1989) (May 22, 1989) (*de novo* standard of review applied in determining whether the defendants violated §1132(a)(1)(B) in denying plaintiffs' benefits under an unwritten severance plan since there was no evidence that the plan vested its administrator or fiduciary with discretionary authority).
11. *Filary v. General Am. Life Ins. Co.*, 711 F.Supp. 528, 530 (D. Ariz. 1989) (May 12, 1989) (fiduciary's denial of plaintiff's medical expense reimbursement claim not reviewed *de novo* since fiduciary's decision was based on discretionary authority).
12. *Bilka v. Blue Bell, Inc.*, 712 F.Supp. 509 (M.D.N.C. 1989) (May 11, 1989) (since the plan terms granting discretionary power to the administrator to determine which terminations receive the qualifying layoff designation meet the standard outlined in *Bruch* for a grant of discretionary authority, administrator's decision upheld under an abuse of discretion standard, *i.e.* whether there was a reasonable basis for the administrator's decision, as required by *Bruch* where such discretion is granted).
13. *Brunner v. Sun Ref. & Mktg. Co.*, (Not Reported in F. Supp.), 29 Wage & Hour Cas. (BNA) 505, No. 86 C 20272 (N.D. Ill. May 10, 1989) (WESTLAW, 1989 WL 57710) (defendants' motion for summary judgment denied as a result of new *de novo* standard set forth in *Bruch* for reviewing claims for denial of benefits under ERISA, without mention of alternate standard regarding whether discretion was granted to administrator or fiduciary).
14. *Doza v. Crum & Forster Ins. Co.*, \_\_\_ F.Supp. \_\_\_, (D.N.J. May 8, 1989) (WESTLAW, 1989 WL 73467) (based on analysis of administrator's denial of benefits under an exclusion in coverage under the terms of the plan, held that the administrator erred both under a *de novo* standard, where the

evidence showed the exclusion was not applicable, and under an abuse of discretion standard, where the court found that the administrator operated under a conflict of interest and that the administrator applied an exclusion other than that outlined in the plan).

15. *Tomczyk v. Blue Cross & Blue Shield United of Wis.*, \_\_\_ F.Supp. \_\_\_, No. 88-C-690 (E.D. Wis. May 8, 1989) (WESTLAW, 1989 WL 70377) (court requests parties to supplement their briefs with discussion of *Bruch* while holding in abeyance defendant's motions for summary judgment and jury trial).
16. *Wallace v. Cavenham Forest Indus., Inc.*, 707 F.Supp. 455, 461 (D. Or. 1989) (May 8, 1989) (on motion for reconsideration in view of *Bruch*, district court applied *de novo* standard to review unambiguous plan provisions, and without addressing issue of whether plan administrator was granted discretion, found the same result as under its initial arbitrary and capricious review).
17. *Hill v. Bethlehem Steel Corp.*, (Not Reported in F.Supp.), Nos. 87-7763, 87-7764 (E.D. Pa. May 6, 1989) (WESTLAW, 1989 WL 60441) (granting defendant employer's summary judgment motion, court assumed that the *de novo* standard of review would be applied in light of *Bruch* since the applicable section of the subject pension plan did not involve discretionary considerations).
18. *Holian v. Leavitt Tube Co., Inc.*, (Not Reported in F.Supp.), No. 89 C 0354 (N.D. Ill. Apr. 28, 1989) (WESTLAW, 1989 WL 44570) (retroactive change in valuation dates by employer, resulting in significant reduction in plaintiff's benefits under profit sharing plan, was not subject to *de novo* review under *Bruch* since the plan committee was provided discretionary authority to construe the plan in determining eligibility).

19. *Retirement & Sec. Program v. Oglethorpe Power*, 712 F.Supp. 223, 226 (D.D.C. 1989) (Apr. 25, 1989) (under *Bruch*, the terms "the Committee shall have authority to determine all questions arising in connection with the Program, including its interpretation" grant discretion to the administrator, and therefore, administrator's decision should be reviewed under an arbitrary and capricious standard and not a *de novo* standard).
20. *Paul v. Valley Truck Parts, Inc.*, (Not Reported in F.Supp.), No. 88 C 7131 (N.D. Ill. Apr. 19, 1989) (WESTLAW, 1989 WL 44586) (in light of *Bruch*, defendant's actions and decisions concerning separation pay was reviewed *de novo* except insofar as defendant had been granted discretionary authority to determine eligibility or to construe the terms of the plan).
21. *Schiller v. Mutual Benefit Life Ins. Co.*, 713 F.Supp. 1064, 1065-66 (E.D. Tenn. 1989) (Apr. 11, 1989) (if an ERISA plan does not provide discretionary or final authority to an employer or administrator to construe uncertain contract terms, under *Bruch*, courts should review the employee's claim *de novo*).
22. *Rizzo v. Caterpillar, Inc.*, (Not Reported in F.Supp.), No. 88 C 0080 (N.D. Ill. Apr. 3, 1989) (WESTLAW, 1989 WL 36411) (noting that little guidance was available at the time of the court's decision on what constitutes an abuse of discretion under *Bruch* in reviewing a denial of ERISA benefits, the court held employer's decision to deny retirement benefits was an abuse of discretion since the benefits were denied by individuals without discretionary authority).
23. *Sandifer v. Central States S.E. & S.W. Areas Pension Fund*, 709 F.Supp. 713, 716 (E.D. La. 1989) (Mar. 30, 1989) (defendant fell within exception to *de novo* review under *Bruch* since the trustees of the pension plan were exercising discretionary

authority specifically vested in them by the trust instrument when they determined plaintiff's pension benefit eligibility within the language of the plan requirements).

24. *Ferrara v. Allentown Physician Anesthesia Assocs., Inc.*, 711 F.Supp. 206, 209 (E.D. Pa. 1989) (Mar. 28, 1989) (arbitrary and capricious standard of review applied to plaintiff's action against employer's pension and profit sharing plans under *Bruch* since language of the subject plans gave plan administrator sufficient discretionary authority to interpret the plan's language).
  25. *Garavuso v. Shoe Corps. of Am. Indus., Inc.*, 709 F.Supp. 1423, 1425-26 (S.D. Ohio 1989) (Mar. 22, 1989) (employer's decision to deny severance benefits was subject to *de novo* review in light of *Bruch* since the benefit plan did not grant employer the deferential power to construe uncertain terms of the plan or to make eligibility determinations).
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No. 89-137

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Supreme Court, U.S.

FILED

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JOSEPH F. SPANIOLO, JR.  
CLERK

In The  
**Supreme Court of the United States**  
October Term, 1989

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DONALD A. LOWRY,

*Petitioner,*

v.

BANKERS LIFE AND CASUALTY  
RETIREMENT PLAN, ET AL,

*Respondents.*

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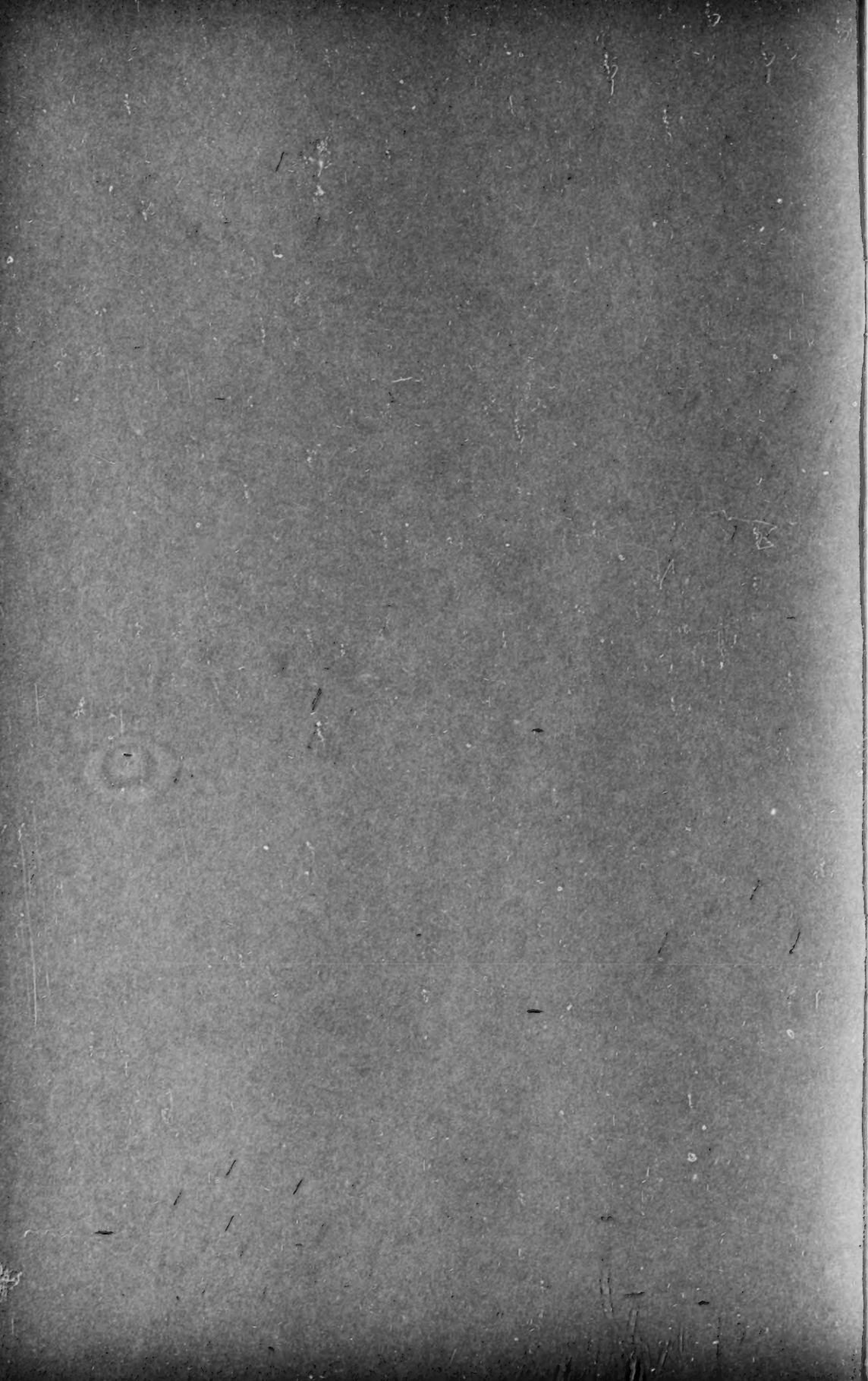
**PETITIONER'S SUPPLEMENTAL BRIEF  
IN SUPPORT OF PETITION FOR  
WRIT OF CERTIORARI**

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## TABLE OF AUTHORITIES

Page

## CASES

<i>Firestone Tire &amp; Rubber Co. v. Bruch</i> , ___U.S.___, 109 S.Ct. 948, 103 L.Ed.2d 80 (1989).....	3, 4
<i>Pierre v. Connecticut General Life Insurance Com- pany</i> , 877 F.2d 345 (5th Cir. 1989) .....	2, 3, 4
<i>Pierre v. Connecticut General Life Insurance Com- pany</i> , 866 F.2d 141 (5th Cir. 1989) .....	2, 3, 4



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PETITIONER'S SUPPLEMENTAL BRIEF  
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TO THE SUPREME COURT OF THE UNITED STATES:

NOW COMES Petitioner, Donald A. Lowry, and files this his Supplemental Brief in Support of his Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit and in support of same would show the Court the following:

I.

THE COURT OF APPEALS ERRED IN HOLDING PETITIONER WAIVED THE ISSUE OF ADMINISTRATOR BIAS.

Since filing his Petition for Writ of Certiorari in late July in this case, Petitioner has discovered the newly

published case of *Pierre v. Connecticut General Life Insurance Company*, 877 F.2d 345 (5th Cir. 1989), decided on rehearing on July 3, 1989 by the United States Court of Appeals for the Fifth Circuit. Petitioner believes such case supports the granting of his Petition for Writ of Certiorari and should be considered by this Honorable Court.

*Pierre v. Connecticut General Life Insurance Company*, *supra*, was originally decided by a different panel of the Fifth Circuit on February 23, 1989. In that opinion, found at 866 F.2d 141 (5th Cir. 1989), the plaintiff in the case, Mrs. Pierre, brought forth an appeal from a denial of an ERISA benefits claim. In the original opinion, the Fifth Circuit noted that Mrs. Pierre had raised the conflict of interest shown by the fact the insurance company, Connecticut General, was also the decision-making fiduciary of the ERISA plan. However, the Fifth Circuit refused to consider such bias or self-interest of the administrator and expressly held the arbitrary and capricious standard of review was applicable *even when biased administrators act in a conflict of interest position*. There the Court stated:

Mrs. Pierre contends that the arbitrary and capricious standard is inappropriate in this case because of the self-interest Connecticut General has in denying benefits. While Mrs. Pierre's concern is not without merit, *this circuit's rule follows the weight of authority applying the arbitrary and capricious standard in ERISA cases. (citations omitted) The standard applies equally when the insurance carrier is the decision-making fiduciary. (citations omitted)* The district court correctly applied an arbitrary and capricious standard of review.

*Pierre v. Connecticut General Life Insurance Co.*, 866 F.2d 141 (5th Cir. 1989) at p. 143. (Emphasis added)

With the announcement of this Honorable Court's decision in *Bruch*, Mrs. Pierre sought rehearing which, on July 3, 1989, was granted. *Pierre v. Connecticut General Life Insurance Co.*, 877 F.2d 345 (5th Cir. 1989). The Court stated:

Our previous decision, 866 F.2d 141 (1989), is vacated and the cause is remanded to the district court for reconsideration in light of the recent United States Supreme Court decision in *Firestone Tire and Rubber Company v. Bruch*, \_\_\_ U.S. \_\_\_, 109 S.Ct. 948, 103 L.Ed.2d (1989).

*Pierre v. Connecticut General Life Insurance Company, supra*, at p. 346.

The relevancy of this case to Petitioner's case is clearly seen when one examines language used by the Fifth Circuit Court of Appeals to explain its reasons for denying Petitioner's post-*Bruch* rehearing motion. In headnote 3 of the opinion the Fifth Circuit stated:

The appellant cannot justify raising the conflict of interest argument for the first time in his petition for rehearing. *A plan administrator's conflict of interest is clearly material to judicial review of our circuit's pre-Bruch arbitrary and capricious standard.* See Appendix to petition pages 7B and 8B. (Emphasis added)

Based upon this assertion that the Fifth Circuit's pre-*Bruch* standards allowed for modification or judicial relaxation of the absolute judicial deference seen in the

arbitrary and capricious review standard, the Fifth Circuit denied rehearing holding that Lowry waived such point by failing to raise it before *Bruch*. However, as can be seen by review of *Pierre*, even those Fifth Circuit ERISA claimants who did raise administrator bias and conflicts of interest prior to *Bruch* were met with the same result, to wit: the Fifth Circuit's adamant refusal to consider administrator bias as a basis to modify the arbitrary and capricious standard of review under ERISA.

Petitioner submits that under such circumstances, it was inequitable and unjust for the Fifth Circuit to hold a failure of Petitioner to raise the issue of the Respondent administrator's bias waived his post-*Bruch* right to complain of same when published opinions of the same Fifth Circuit court establish it had steadfastly refused to consider administrator bias when it *was* timely raised. As such, this Honorable Court should hold Petitioner has not waived his *Bruch*-created right to complain of administrator bias in this case.

Respectfully submitted,

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